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No. 64

Supreme Court of the United States

October Term, 1947

THE UNITED STATES OF AMERICA,
Appellant,

VERSUS

L. C. GRIFFITH, H. J. GRIFFITH, CONSOLIDATED THEATRES, INC., ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF OF APPELLEES

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STATEMENT

This action was instituted by the United States of America April 28, 1939, by the filing of a Complaint which alleged violations of Sections 1 and 2 of Title 15 U. S. C. A. and in which relief was sought under Section 4 of that Act. The charges in the Complaint were limited to the period April 28, 1934, to April 28, 1938 (R. 6, 38).

The action was dismissed as to all of the distributor defendants (R. 49-50). The complainant amended the Complaint by striking Paragraphs 39, 40, 41, 42, 49 and 50 (R. 50). The Complaint was amended by Bill of Particulars

filed May 17, 1940 (R. 36-39). In Paragraph 26 of the Complaint (R. 4) it was alleged that, "Clearance is protection against competition granted to an exhibitor, by agreement with a distributor, which limits the terms on which the distributor may license films to other competing exhibitors." In Paragraph 6 of the Bill of Particulars, it was stated, "(b) By the definition of the term 'clearance' in paragraph 26 it is intended to exclude all clearance other than that 'which limits the terms on which the distributor may license films to other competing exhibitors'" (R. 37). In Paragraph 18 of the Bill of Particulars it was stated, "(c) The manner in which the matters alleged in Paragraph 41 had the effect of enabling the defendant exhibitors to control and monopolize the supply of feature pictures available for exhibition in the Griffith towns as set forth in Paragraphs 42 and 43" (R. 39). In Paragraph 19 of the Bill of Particulars it was stated, "(b) and (c) The defendant exhibitors have compelled each of the defendant distributors to grant to them the privileges set forth in Paragraph 42 by refraining from licensing the product of the defendant distributors for exhibition in the Griffith towns unless the exclusive privileges set forth in Paragraph 42 were granted to them" (R. 39). The above paragraphs of the Complaint, as amplified by the Bill of Particulars, state the charges of violation of the Sherman Act on which this case was tried. The charge was that the defendants combined through a common agent in the licensing of motion pictures with the purpose and effect of compelling each of the major distributors to grant them (a) The exclusive privilege of selecting from the feature pictures released by said distributors such feature pictures as said exhibitors

deemed suitable for exhibition in said towns, as and when prints thereof became available, before said pictures were released to any other exhibitors in said towns; (b) the exclusive privilege of receiving clearance on said feature pictures over competing theatres in said towns (R. 7); and (c) the privilege of receiving more favorable rental terms than can be obtained by competing individual exhibitors (R. 8). The issues raised by the Complaint in this case are much more limited than the issues in *Schine* case (Schine Record 11 -15). The issues in this case are more limited than the issues in the *Crescent* case (Crescent Record 8-10). Each of the cases involved its own facts. It is not a fact that in each of the cases the Government proof consisted principally of licensing agreements made between the defendants and the major distributors, as stated by appellant (Brief —). In the *Crescent* and *Schine* cases the findings of fact were against the defendants. In the case here appellant failed to establish any issue raised by the Complaint, Finding No. 20 reads:

> "The defendants, or any of them, have not conspired or combined with each other, with their operating associates or with the distributors, for the purpose or with the effect to unreasonably restrain or restrict the terms upon which feature pictures were to be, or were, distributed by such distributors, or made available for exhibition in theaters competing with the defendants" (R. 125).

Finding No. 23 reads:

> "The defendants, or any of them, did not monopolize or attempt to monopolize, the licensing or the supply of feature motion pictures for either first, second or

subsequent run exhibition in any situation. The defendants licensed only such supply of pictures as they reasonably believed would be necessary in each situation to satisfy the demands of the public which they served" (R. 126).

Finding No. 25 reads:

> "There was no agreement between the defendants, or any of them, with the distributors, or any of them, granting to the defendants, or any of them, in their theaters unreasonable clearance over the theater of a competitor" (R. 126).

Finding No. 26 reads:

> "In their contracts with the distributors, the defendants and their associates have not conspired or combined with each other to compel such distributors to grant to them the exclusive privilege of selecting feature pictures released by such distributors, as the defendants deemed suitable for exhibition in the situations where they operated theaters, as and when prints thereof became available, before said pictures were released or made available to any other exhibitor in such situation" (R. 126).

Those findings were not based on licensing agreements alone, but were based on those agreements and the oral testimony witnesses. Each finding of fact was supported by ample evidence, as will hereinafter appear. The burden of proof was on the claimant to establish the charges against the defendants. Before the Court would have been warranted in rendering judgment for the claimant, it would have been necessary for the Court to affirmatively

find facts sufficient to sustain a judgment of that character. There is no assignment of error in which the Court failed to find the existence of any material fact, or that the evidence was sufficient to support an affirmative finding of fact which the Court failed to make.

In this case there is no charge in the Complaint, as amplified by the Bill of Particulars, that any provision of any licensing agreement, in and of itself, constituted a violation of the Sherman Act. For example: There is no charge that the defendants violated the Sherman Act by agreeing with the distributor to charge minimum admission prices. If such an agreement does constitute an unreasonable restraint of trade, appellant is not entitled to relief in this case even though such contracts were established. In order for the complainant to have prevailed in this case, it was necessary that it prove that the defendants combined with the purpose and effect of obtaining the privileges above set out. Provisions of the contracts, which appellant now asserts were in unreasonable restraint of trade, are here involved only as they may tend to evidence a wrongful purpose and intent of the defendants in combining in the licensing of film. Should any provision of any licensing agreement be held to have been in unreasonable restraint of trade, it would not follow that the defendants combined for the purpose and with the effect of obtaining that privilege, if the particular privilege or provision was one normally and usually contained in licensing agreements, or if the privilege was of such a character as to indicate that it was procured as the result of normal bargaining and negotiation between a distributor and an exhibitor.

The history of the organization and growth of the corporate defendants and the relation of the individual defendants to the corporate defendants are set out in Findings 1 to 5, inclusive (R. 83-85). As a supplement to that history, we call attention to some additional facts.

Reference will hereinafter be made to Griffith Amusement Company as "Amusement," to Consolidated Theatres, Inc., as "Consolidated," to R. E. Griffith Theatres, Inc., as "R. E. Griffith Theatres, Inc.," and to Westex Theatres, Inc., as "Westex."

Amusement at no time has owned any interest in either of the other defendant corporations (R. 413, 419, 424, 437).

No individual or corporation owned a controlling interest in Amusement. At the time suit was filed it had outstanding 1400 shares of Class A stock and 1400 shares of Class B stock. The holders of Class A stock had the right to elect three directors, and the holders of Class B stock had the right to elect three directors (R. 412). Of the Class A stock L. C. Griffith and R. E. Griffith each separately owned 616 shares and H. J. Griffith owned 168 shares. Of the Class B stock L. C. Griffith and R. E. Griffith each owned 12 shares and H. J. Griffith owned 123 shares (R. 413-414). The stock owned by the three Griffiths in the aggregate is not sufficient to constitute stock control of that corporation, as they owned only a small amount of the Class B stock, the holders of which had the right to elect three of the six directors.

While R. E. Griffith and H. J. Griffith were directors of Amusement at the time of the filing of suit, both of them were residing elsewhere and were actively engaged in other business and were not active in the affairs of Amusement, either as directors or otherwise.

Since 1931 and until his death in 1943, R. E. Griffith had not participated in the affairs of Amusement, except as agent in the licensing of pictures. After the 1937-38 season that representation ceased (R. 1866-1867). H. J. Griffith was employed by Amusement until April 1, 1939, when he moved to Kansas City, Missouri. Thereafter, he was not active in the conduct of its business (R. 1819-20). At the time of the trial H. J. Griffith was not an officer, director or stockholder in the corporation. His stock had been transferred in trust for his children (R. 1831). R. E. Griffith died in 1943, and H. J. Griffith, R. I. Payne and F. L. Stocker were appointed executors of his estate (R. 1821).

Consolidated owned 239 shares of stock in Amusement and 250 shares of stock in R. E. Griffith Theatres, Inc. L. C. Griffith owned 1530 shares of the 3000 shares of outstanding stock of Consolidated. R. E. Griffith, individually, owned no stock and was not a director in Consolidated, but R. E. Griffith Theatres, Inc. owned 250 shares and H. J. Griffith owned 552 shares (R. 419).

R. E. Griffith Theatres, Inc. owned 199 shares of stock in Amusement (R. 413), 250 shares of stock in Consolidated (R. 419), and 12,900 shares of the 17,376 shares of stock outstanding in Westex (R. 437). R. E. Griffith owned 2,095 shares out of a total outstanding stock of 5,083 (R. 424, 1821) of R. E. Griffith Theatres, Inc. At the time of the trial

H. J. Griffith owned 125 shares of stock in R. E. Griffith Theatres, Inc., and L. C. Griffith owned none (R. 424). Westex Theatres, Inc. on April 28, 1939, owned no stock in either of the defendant corporations. R. E. Griffith Theatres, Inc. owned 12,900 shares of the 17,376 shares of outstanding stock of Westex. R. E. Griffith, individually, owned 50 shares of its stock and no other defendant, individual or corporate, owned any of its stock (R. 437).

At the time of the trial, H. J. Griffith owned no stock in Amusement or Consolidated and was not an officer or director in either company (R. 1831), but after he became one of the executors of the Estate of R. E. Griffith, deceased, he became president of R. E. Griffith Theatres, Inc. and Westex, but owned only 125 shares in the first and one share in the latter (R. 1820-21).

Appellant refers to the purchasing power of the "Griffith Circuit" and includes in its brief a table purporting to show the percentage which the aggregate of the "closed towns" bore to the aggregate of all of the towns in which all of the several corporate appellees owned theatres on April 29, 1934, and on April 29, 1939. The words "closed towns" are misleading. The towns to which they have been applied by appellant are merely those in which there was no competition on the respective dates. For the most part they were towns in which there was no competition at the time one of the appellees entered in the town. In the case of Westex they are used to refer to small towns in which there has never been more than one theatre for each town.

Appellant's table, to which we have referred above, is inaccurate and misleading. Each of the corporate defendants on April 29, 1939, owned theatres as set out in Findings 1, 2, 3 and 4 (R. 83-85). The corporate appellees did use R. E. Griffith as a common licensing agent, prior to the season 1938-39, but that arrangement was discontinued after the 1937-38 season. Since then pictures have been licensed by H. R. Falls as the licensing agent for Amusement and Consolidated and by R. E. Griffith, until his death in 1943, for Westex and R. E. Griffith Theatres, Inc. From 1915, when Griffith Brothers acquired their first theatre, to 1926, when Amusement was organized, R. E. Griffith licensed pictures for all of the theatres in which the Griffith Brothers were interested (R. 1849). After the organization of Amusement, R. E. Griffith licensed pictures for all of the theatres in which it was interested. After Consolidated commenced business in 1930, he licensed pictures for Amusement and Consolidated. In 1931 he terminated his employment with Amusement and disposed of all of his stock in Consolidated. He resigned from Amusement in order to establish his own business. He exchanged the stock which he owned in Consolidated for theatres which Consolidated owned in the three New Mexico towns of Gallup, Hobbs and Roswell. On May 1, 1931, he moved to Roswell and on December 23, 1931, incorporated R. E. Griffith Theatres, Inc., which he actively managed until his death. He never again lived in Oklahoma City (R. 1589-1590). After May 1, 1931, he did not participate in the management of Amusement or Consolidated. He was in Oklahoma infrequently (R. 1866).

R. E. Griffith was experienced in the licensing of pic-

tures and was one of the most competent buyers in the business (R. 1321). When he left the employment of Amusement and severed his connection with Consolidated, in the Spring of 1931, those companies were left without an experienced buyer. Neither L. C. Griffith nor H. J. Griffith had any experience in licensing pictures and Falls, who had been assisting R. E. Griffith, did not have sufficient experience to act as buyer without the assistance of a more experienced person. The result was that L. C. Griffith got in touch with R. E. Griffith and prevailed on him to assist Falls in the licensing of pictures for Amusement and Consolidated. Thereafter, until the season 1938-39, he did assist Falls in licensing pictures for Amusement and Consolidated. He also licensed pictures for R. E. Griffith Theatres, Inc. and for Westex after it began business in 1936. During that time he was not a regular employee of Amusement or Consolidated and received no compensation except for the time he spent in supervising the licensing of pictures during the fall of the year. He never did anything else for Amusement or Consolidated (R. 1867). Beginning with the 1938-39 season, R. E. Griffith had no connection with the licensing of pictures for Amusement or Consolidated. Thereafter, the pictures were licensed for them by Falls and the negotiations were carried on in Oklahoma. That change was brought about because R. E. Griffith wanted to do the buying in New York City, and L. C. Griffith thought that method of buying was costing too much and preferred that it be done in Oklahoma City (R. 1868).

After the season 1937-38 the theatres of the four corporate appellees cannot properly be considered in the ag-

gregate in connection with the alleged buying power of the appellees.

In its table appellant has excluded Oklahoma City. It states that it has done so because that city was excluded from plaintiff's claims of illegal restraint. We submit that in considering the question of buying power there is no excuse for excluding any towns for which either of the appellees licensed pictures. Oklahoma City was the largest city in Oklahoma, and Amusement and Consolidated each operated a theatre which always occupied a subordinate position. Although the number of towns in which appellees had no competition, as compared with those in which they did have competition, does not furnish any correct measure of "buying power" and does not tend to establish an attempt to monopolize interstate trade, we, nevertheless, challenge the correctness of appellant's table and assert that the undisputed evidence shows the facts which will now be stated.

On April 28, 1934, Amusement was operating theatres in twenty-two towns and had competition in eleven towns; and, at the time of the filing of this suit, it was operating theatres in twenty-two towns and had competition in fourteen of those towns (Defts'. Ex. 108, R. 2702, Ev. R. 1595). On April 28, 1934, Consolidated was operating theatres in eleven towns and had competition in seven towns. At the time this suit was filed, it was operating theatres in twenty-one towns and had competition in nine of them (R. 3052-64, Defts'. Ex. 109, R. 2703, Ev. R. 1595). In addition, Consolidated owned a 25% interest in theatres in Alvin, Bay City, El Campo, Victoria, Wharton, Texas City, Cuero, New Braunfels, Refugio and Uvalde. In four of those towns there was

competition. Neither Amusement nor Consolidated operated theatres in either of those towns or licensed pictures for them (R. 1595).

Those towns should not be included in determining the percentage of competitive and non-competitive towns in which Amusement and Consolidated used a common agent in licensing pictures as of April 29, 1939, or any time during the period here involved. Neither of those towns is included in the last contracts which were negotiated by R. E. Griffith for the four companies, to-wit, for the season 1937-38. For that season the above towns are not included in any contract (Exs. L-6, R. 2264, 2270, P-4, R. 2329, 2333, F-7; R. 2223, 2220, U-4, R. 2483, W-8, R. 2542, 2546, C-5, R. 2157, 2158). None of those towns were included in the licensing agreements of Amusement and Consolidated for the 1938-39 season.

At the time of the filing of this suit, H. R. Falls was licensing pictures for Amusement and Consolidated in a total of forty-three towns, and there was competition in twenty-three of them (Findings 1 and 2, R. 83, 84). The total number of towns in which Amusement and Consolidated were operating was only ten more than on April 28, 1934, and there was competition in five more towns than in 1934. The competitive towns were 53.5 per cent of the total.

On April 28, 1934, R. E. Griffith Theatres, Inc. was operating theatres in eight towns and had competition in three of them. Westex was not organized until March 27, 1936. At the time this suit was filed, R. E. Griffith was licensing pictures for R. E. Griffith Theatres, Inc. in thirteen

towns, of which three were competitive, and for Westex in twenty-five towns, of which seven were competitive (Pltf's. Ex. 381, R. 1100, 1104). The total number of towns in which R. E. Griffith Theatres, Inc. and Westex were operating theatres on April 28, 1939, was thirty-eight, and there were competing theatres in ten of them. The towns in which there was competition comprised 26% of the total. Of the towns in which there was no competition only one, to-wit Clovis, New Mexico, had a population in excess of 4,000. At the time of the organization of Westex, it acquired theatres in nine towns from R. E. Griffith Theatres, Inc. (R. 437-438). All of the theatres subsequently acquired by Westex were in one-theatre towns, except in the towns in which there was competition. No competition was eliminated at the time of the acquisition or thereafter (Pltf's. Ex. 381, R. 1100-1108). R. E. Griffith Theatres, Inc. and Westex were operating in only five towns having a population of 4,000, or more, and in the remainder of the towns, the population ranged from 404 to 4,000. In most of the towns in which Westex and Consolidated were operating, there had never been any competition, and the towns were fortunate to have one motion picture house. There is nothing in the record to indicate that the percentage of non-competitive towns in which the defendants were operating was any greater than the percentage of non-competitive towns operated by independent exhibitors as to the total of independent towns in the area. No defendant acquired any theatre by means of any predatory practice or with the intent or purpose to unreasonably restrain trade or stifle competition (Finding No. 14,

R. 123). There was no evidence as to the earnings of any of the defendant corporations. Therefore, there was no evidence that such earnings were out of proportion to the physical expansion of the gross receipts and assets (Compare with *Crescent* Case, 323 U. S. 173, 183). The expansion of theatre ownership was not accomplished by predatory practices, competition was not limited by predatory practices, and there was no combination for the purpose or with the effect of crushing competition (Findings No. 10, 14 and 15, R. 87, 123). There was no demand by the defendants for monopoly rights in towns where they had competition, as a condition to giving the distributor business in towns where they had no competition (Finding No. 12, R. 123).

Appellant has asserted that Fox, Loews, Paramount, RKO, Warner, Columbia, Universal and United Artists distributed substantially all of the first class feature film. The evidence is that they constituted less than half of the distributors of motion pictures during the period here involved. Pictures were distributed by Republic, PRC, Monogram, Grand National, Allied, Adams, British Gaumont, Square Deal, Sax and Majestic (R. 941, 942, 1016, 1017). Many of the so-called independent distributors sold good "A" feature pictures (R. 1225). The number of pictures released by all of the independents is not shown, but the approximate number released by four of them was 375 (R. 784-785). The evidence is that the major companies did produce a greater number of top box-office pictures than were produced by independents. However, only a small number of the total released by each major distributor was considered to be in that class. One of appellant's witnesses rated the major

distributors as to quality of production as follows: Metro, Paramount, Fox, Warners, RKO, Columbia, Universal and United Artists, in the order named. That witness stated that the number of top pictures released by each was as follows: Metro—6 to 8, Paramount—8 to 10, Fox—6 to 8, Warners—3, RKO—2, Columbia—2, Universal—2, and United Artists—2 (R. 946-947). The number of pictures which were actually produced and made available for exhibition by each distributor for each season cannot be determined by the number licensed. As the pictures were licensed before production, there were many of them which were never produced (R. 1303, 1773).

ARGUMENT

The Contracts by Which Appellees Licensed Films Did Not Unreasonably Restrain Trade.

The charge in the Complaint is that the defendants combined their theatres in licensing pictures with the purpose of compelling each of the major distributors to grant them specified special privilege (Complaint, Pars. 41-42, R. 6). It was not charged that any of the provisions of any licensing agreement, in and of itself, constituted a violation of the Sherman Act. For example: There is no charge that the defendants violated the Sherman Act by agreeing with the distributor to charge minimum admission prices. If an agreement between a distributor and an exhibitor, which contains a minimum admission price clause, does constitute an unreasonable restraint of trade, appellant

is not entitled to relief in this case, even though such agreement were established.

In order for the complainant to prevail in this case, it was necessary that it prove that the defendants combined with the purpose and effect of obtaining the privileges set out in Paragraph 42 or combined with the purpose and effect of obtaining more favorable rental terms that could be obtained by competing individual exhibitors (Par. 49). Provisions of the contracts, which appellant now asserts were in unreasonable restraint of trade, are here involved only as they may tend to evidence a wrongful purpose and intent of the defendants in combining in licensing film.

Appellant asserts that contracts by which pictures were licensed were normally made on a distributor's printed form, and that a typical sample of such printed form is set forth as Appendix B of appellant's brief. It further asserts that the printed forms ordinarily specified the number of features licensed, the number which the exhibitor is required to play, the name of the theatre in which the film is required to be played, the rental or license fee for each film and the minimum admission prices to be charged by the exhibitor. As we have not been furnished with Appendix B, above referred to, we must assume that the form which there appears is one of the standard printed forms, which appear in the record (Ex. C-27, R. 2189, F-96-2, R. 2336, L-129, R. 2294, P-120, R. 2387, W-60, R. 2572, W-60, R. 2572). In each instance in which the printed form was attached to a so-called "master" licensing agreement between appellees and a distributor, the complete agreement has not been printed in the record, but the entire printed form

was made a part of the contract. In those instances it will be necessary to refer to the complete standard forms as above set out. Thus, Plaintiff's Exhibit C-5 (R. 2143) incorporates in the agreement the provisions of the standard form of contract and there is attached what purports to be a copy of the printed agreement (R. 2147, 2148), but there has been printed only part of the printed form, as appears from an examination of Plaintiff's Exhibit C-27-2 (R. 2189).

Appellant's statement that the distributors' printed forms contained the rental terms, as outlined above, is erroneous. The printed forms merely contained the general provisions common to most contracts, but the matters which are determined by negotiation between the parties must be written after negotiations have resulted in an agreement. In every licensing contract such rental terms be written in the blank spaces in the printed form or attached thereto in the form of a memoranda or rider. As those terms are the subject of negotiation and bargaining between the distributor and the exhibitor, they will vary in some particulars in every contract. Those variances are not evidence that a distributor has been coerced into granting any provision. In the absence of evidence to the contrary, the reasonable inference is that each such provision is the result of normal negotiations between the parties. The written provisions, which appear in the contracts, may conflict with certain clauses of the printed form, in which case the written provisions will prevail over the printed provisions. However, no clause of the printed provision can be considered as having been superseded, unless it cannot be reconciled with the written matter contained in the contract. The undisputed

evidence is that the contracts with appellees resulted from normal negotiations between the parties. The distributors' standard printed form was used in every contract, and attached thereto was a written memoranda which contained the things which were not covered by the printed form. No provision in appellee's contracts unreasonably restrained trade. There is no evidence that any provision in any contract was included therein because of any coercion exerted by appellees, or that appellees combined in the licensing of films for the purpose of obtaining any privilege.

Playing out of order of release. Pictures were not played in strict order of release by any exhibitor (R. 585, 1329-30, 1453-54, 1456). The printed form of contract of each of the distributors contained a provision which permitted an exhibitor to play pictures out of order of release, which was substantially the same as the privilege granted in the defendants' contracts. Typical of such provisions in the printed forms are paragraph 4-c of Plaintiff's Exhibit F-3-G (R. 2210, Ev. R. 370). Appendix A is a copy of paragraph 4-c of Fox's printed form. Printed forms used by other distributors contained similar provisions. (Pltf's. Ex. L-129-4, R. 2296, Ev. R. 381, C-27-2, R. 2192, Ev. R. 389, P-120-11, R. 2389, Ev. R. 210, Ex. 358, R. 2097, Ev. R. 983, W-60, R. 2574, Ev. R. 384).

Fox's memoranda contract with defendants provided that individual contracts would be drawn for each town, and they were so drawn. An individual contract was prepared on the printed form for each town. Each contained identically the same conditions upon which pictures might be played out of order of release, as were contained in contracts with other exhibitors (Pltf's. Ex. F-5-F-

G, R. 2217-18, Ev. R. 370). The defendants' contracts, in addition, required that the exhibitor actually play 25% of the pictures every thirteen weeks. Loew's also prepared individual contracts of each town (Pltf's. Ex. L-8-M, R. 2293, Ev. R. 380). The other distributors attached to a letter memoranda the printed form of contract. An example is the Columbia contract (Pltf's. Ex. C-6-D, R. 2161, Ev. R. 395), which provides that the standard form of exhibition contract herewith attached is to become a part and parcel of this agreement. Columbia's printed form of contract provided in Paragraph 4-C (Pltf's. Ex. C-27-2, R. 2192, Ev. R. 589) for the playing of pictures out of order of release on similar conditions to those stated in the Fox printed form, *supra.*

Each of the printed contract forms contained a paragraph, which was substantially the same as Paragraph Sixth of Fox's form (F-3, R. 2296), which became part of each of the contracts made with appellees and must be construed in connection with the privilege of playing out of order of release. Appendix B is a copy of Paragraph Sixth of Fox's printed form. That paragraph authorized the distributor to designate an availability date for each picture and required the exhibitor to select a play date within fourteen days after the mailing of the notice of availability, the play date to be within thirty days from the available date and, if the exhibitor failed to select a play date, the distributor was authorized to set such date. Although it was not necessary to date the pictures in the order of release, play dates had to be selected when notice of availability was given, and the exhibitor had no control of such availability.

The number of prints available for dating, the difficulties in booking pictures and, particularly, the difficulty in booking important pictures on dates when they would produce the most money made it necessary to play pictures out of order of release (R. 1329). None of the contracts required the distributor to make pictures available to any exhibitor in the order of release, and they were not made available in order of release. It was only reasonable that the exhibitor should not be required to play the pictures in strict order of release. Playing pictures out of order of release was a condition which prevailed throughout the United States, and was applicable to circuits and independents alike. (R. 1329-1330).

By reason of the clause providing for the selection and assignment of play dates, which was a part of all contracts, including defendants', the distributor retained the control of the booking of the pictures (R. 1330, 1453, 1454-56, 1462-63). In Paragraph Sixteenth of said printed form, there was fixed a limit on the time beyond which the exhibition of a picture on first run could not be delayed. Even though an exhibitor agreed to exhibit pictures in order of release, it could not always exhibit them in such order, as the distributor was not required to and did not make pictures available for each exhibitor in the order of release. The above provisions of the printed contract were adequate to enable the distributor to license a sequence of runs and to enable a subsequent run exhibitor to book and play pictures, even though the pictures were not played in order of release on prior run. Therefore, it is not true that defendants could hold back the playing of a picture so as to unreasonably restrict a competitor in either

licensing or playing a picture. That the charge is immaterial to any issue in the case is indicated by the testimony of appellants' own witnesses, who were appellees competitors in eighteen towns. There was no testimony of any restraint of trade or competition resulting by reason of the privilege of playing out of order of release, or that any exhibitor was discriminated against in that particular, or that he was delayed in playing pictures. Only one of plaintiff's witnesses testified in regard to that matter, and he stated that he was not required to play pictures in the order of release; that dates would be set up for all pictures as they became available, but that they could be played out of order of release, although sometimes he had to pay for them if they were not played within a reasonable time after availability (R. 585). The privilege of playing out of order of release did not prevent the sale of regular runs following any defendants' theatre (R. 1468). Regular second or subsequent runs, following a defendants' theatre, were licensed in Ada (R. 935-936, 944), Enid (R. 597-598, 599-600), Norman (Pltf's. Ex. 288, R. 2068, Ev. R. 696), Lubbock (R. 476, 489), Shawnee (R. 535, 559, 560-562, 567), Stillwater (R. 835), and Blackwell (R. 449). An exhibitor who had a second run after them could determine when it would be available in the same manner as he would if the pictures were played under the provisions of the printed form of contract (R. 1462). In either event he could book the picture after it had been booked on prior run and not before. In either event the distributor controlled the booking in the same identical manner (R. 1500, 1509).

The above evidence establishes that appellant has erroneously asserted that the privilege of playing out of

order of release tended to prevent competitors from licensing a regular run following a prior run. The testimony of Warner's sales manager, which was referred to by appellant, does not tend to support that assertion. That witness testified that ordinarily pictures are not played in the strict order of release as available, and that during a period involved the general practice was to allow for booking facility and also for facility in running and operating a theatre (R. 1509, 1510). That witness further stated that appellees under their contract did not have the right to delay the dating of pictures at their pleasure, as the distributor had the means in the provisions of the printed contract attached to the master agreement to prevent the withholding of first run dates (R. 1509). That witness further stated that under appellees' contract, second run pictures could be licensed, dated and played in the same manner as if the contract had been entirely written on the printed form (R. 1508, 1509). There was no evidence that competitors of the appellees had no opportunity to deal with the distributors for films not used at all by appellees or for subsequent runs of films played by appellees on a prior run, except as appellees should decide to make such films available to them. The evidence is to the contrary, as above set out. Pictures were licensed on subsequent runs following a prior run of one of the appellees, and there was no testimony from any source that the competitors in those situations were prevented from dealing with the distributors or from promptly obtaining and playing the pictures.

In licensing pictures, subject to such clauses, appellees had no privilege which was not extended by the distributors

to all other exhibitors, including the appellees' competitors. There was no discrimination or special privilege given to appellees in permitting the playing out of order of release. There is no evidence that appellees combined in licensing pictures for the purpose of obtaining that privilege, or that any distributor granted the privilege because of the alleged buying power of appellees.

Optional second run. Appellant contends that appellees were given the privilege of playing picture on second run, at their option, in various towns under the terms of certain contracts, and that the defendants were enabled thereby to unreasonably tie up second run product.

Finding No. 23 (R. 126) reads:

> "The defendants, or any of them, did not monopolize, or attempt to monopolize, the licensing or the supply of feature motion pictures for either first, second or subsequent run exhibition in any situation. The defendants licensed only such supply of pictures as they reasonably believed would be necessary in each situation to satisfy the demands of the public which they served."

That finding is not assigned as error. That should eliminate consideration of the contention that appellees unreasonably tied up second run product.

There were competitors who licensed second run product which was not used by any appellee. Not a single one of those exhibitors testified that he was unable to license second run product which was not used by such appellee until such time as the pictures had lost their value for second

run exhibition, or that he was unreasonably delayed in the booking or playing of those pictures.

The Fox contract for the 1934-35 season (Pltf's. Ex. F-2, R. 2202, Ev. R. 370) contained a definite commitment for forty features second run for Lubbock, Shawnee and Chickasha and prices were set up for repeat runs in Bartlesville, Enid, Okmulgee and Pampa, but there was no optional contract. For the 1935-36 season (Pltf's. Ex. F-3, R. 2207, Ev. R. 370) the privilege was granted of using thirty pictures second run in eleven towns which were named. For the 1936-37 and 1937-38 seasons, a similar privilege was granted (Pltf's. Ex. F-5 and F-7, R. 2213, 2221, Ev. R. 366, 368). For the 1938-39 season (Pltf's. Ex. F-8, R. 2227, Ev. R. 370) there was a definite commitment at fixed rentals in each of the second run situations. When the memoranda contract was entered into in New York, appellees didn't know exactly how many second run pictures they would be able to run in the towns covered by the contract, but when the contracts were made up for the individual towns, a definite contract for the number of pictures they would use in each of the second run situations was executed (R. 1323-1324).

The contract with RKO (Pltf's. Ex. RKO-44, R. 2422, Ev. R. 355) was not an optional contract, but was a definite commitment on twenty-six pictures second run in specified towns. The Universal contract for the 1934-35 season (Pltf's. Ex. U-1, R. 2469, Ev. R. 397) was not an optional contract, but was a selective contract for both first and second run. In subsequent years (Pltf's. Ex. U-2, U-3 and U-6, R. 2475, 2479, 2501, Ev. R. 398, 402) there was a definite commitment limited to eight top features and six westerns, and prices were set

out in allocation sheets which were attached to the contract. The Warner contracts (Pltf's. Ex. W-3, W-4, W-6, W-7, W-8, W-11, R. 2507, 2522, 2529, 2542, 2560, Ev. R. 384, 386, 387, 388) were definite purchases of second run in specified towns. The Columbia contract (Pltf's. Ex. C-4, C-5, R. 2126, 2143, Ev. R. 391, 392) was not an optional contract, but was a selective contract for the playing of second run pictures set out in the schedule at C-4-F in certain specified towns. The Metro franchise (Pltf's. Ex. L-1, R. 2241, Ev. R. 374), which covered the seasons 1930-31 to 1934-35, inclusive, licensed product for second run in only two situations, to-wit, Enid and Oklahoma City. It was a definite commitment for those towns, and there was no agreement of any kind for second run in any of the other situations. The contracts for the seasons 1935-36, 1937-38, 1938-39 (Pltf's. Exs. L-4, L-6, L-8, R. 2250, 2264, 2285, Ev. R. 376, 378, 380) were not optional contracts at all, but were selective second run contracts on thirty features.

The original Paramount franchise (Pltf's. Ex. P-1, R. 2309) contained a clause whereby the distributor agreed that whenever requested it would furnish to the exhibitor a second run for not exceeding each of twenty of the towns embraced in the agreement. In September of 1936 that clause was modified (Pltf's. Ex. P-1-Y, R. 2319-20, Ev. R. 212) to provide that "exhibitor shall be furnished forty feature length pictures in Lubbock, Borger, Pampa, Ardmore, Shawnee, Seminole, Bartlesville, Okmulgee, and Ada." Paramount contracts for the 1937-38 and 1938-39 seasons (Pltf's. Ex. P-4 and P-5, R. 2329, 2336) granted the privilege of playing second run thirty pictures in specified

towns. In considering the reasonableness of the above contracts, it is important to bear in mind that prior to the Consent Decree, the major distributors all licensed their product in advance of production with the exception of United Artists. They endeavored to license all of their pictures to one customer for first run exhibition. The exhibitors did not know what the pictures would be like when produced or what box office value they would have, even on first run, and certainly could not tell what value they would have on second run until after they had been released. Most of the contracts were definite commitments for a specified number of pictures in specified towns, but with the privilege of making the selection from all of the pictures released. The contracts were made for only those towns in which appellees were operating second run theatres. Clearly the contracts were not made for the purpose of tying up second run product. They were merely attempting, as best they could, to meet their requirements for their second run houses according to the customs of the trade. Those agreements must also be considered in connection with the provisions of the printed contract form which authorized the distributor to fix the available date for the booking of all pictures, at any time after the prints were received, and which required the exhibitor to promptly select play dates. The exhibitor could not delay beyond that time in determining whether or not he would exhibit the picture on second run. That provision made it impossible for the exhibitor to delay unreasonably in making a selection or rejection of the pictures. The pictures could always be made available for licensing to another exhibitor within a reasonable time after release date and prior to the first

run exhibition. It is significant to note that, during the entire period involved, none of the contracts granted any second run privileges to Amusement or Consolidated in towns in which they had no second run house, as in Clinton, Duncan, Elk City, Stillwater, Altus, Blackwell, Sapulpa, Hobart or Mangum, although there was competition in each of those towns. No contract granted any second run privilege to R. E. Griffith Theatres, Inc. or Westex in any of its towns. Second run privileges were only obtained in towns where they were needed by defendants.

Under the heading of "Altus" under Subdivision E-1 of Part II of appellant's brief, appellant asserts that appellees' master agreements with Fox, Loew, Paramount, and Warner gave them the privilege of a second run in Altus without additional film rental. In support of that statement appellant refers to Ex. F-5 (R. 2213), Ex. L-5 (R. 2262), Ex. P-3 (R. 2320-2326), and Ex. W-7 (R. 2540). Those references refer to contracts for the season 1936-37. Those contracts, which appellant has referred to, show exactly the contrary to the statement by appellant. There is no contract or evidence in the record in this case that will support that statement. The Fox contract (Ex. F-5, R. 2213) specifies the towns in which appellees had the privilege of exhibiting pictures on second run. Altus was not one of those towns. The Loew's contract (Ex. L-5, R. 2262) specifies such towns and Altus was not one of them. Warner's contract (Ex. W-7, R. 2540) specifies the second run towns and Altus is not named. The Paramount contract referred to (Ex. P-3, R. 2320-2326) was never executed by Paramount and no pictures were licensed under it (R. 337, 338).

The second run agreement between appellees and Paramount for the 1936-37 season is contained in the supplemental agreement of September 22, 1936 (R. 2318-2322, Ev. R. 213). It specifies the towns in which the exhibitor shall furnish second run pictures (R. 2320) and Altus is not named. There is no proof that the above contract provisions were entered into with the intent to tie up product, or that such was its effect.

Those provisions of the contracts were not unusual. In the first run contract with Amusement's Shawnee competitor for the 1933-34 season an option was granted to Jones for second run product (Pltf's. Ex. 117, R. 2046, Ev. R. 307). Scaling, Westex's Plainview competitor, testified that when he was playing first run Paramount product, he was permitted to return the outstanding pictures for second run exhibition (R. 215).

Appellant asserts that the foregoing second run provisions were similar to the second run options "granted by the same distributors to the Crescent circuit and condemned by this Court in *United States* v. *Crescent Company.*" The provision referred to in the opinion of this Court in the *Crescent* case was only the "repeat run clause in the franchise" of Paramount. That clause was not similar at all to the second run provisions in any of appellees' contracts, except the clause contained in the original Paramount franchise. In the *Crescent* case the repeat run provision was coupled with unreasonable clearance provisions. The trial court found, from the evidence of competitors, that it was used for the purpose of tying up product which the defendants did not need and could not use. In Finding 70 the Court

stated that "Although the 1937-38 product was thus tied up Crescent played only four pictures second run and the first of these was played after the close of the 1937-38 season." Other similar findings were made. Most of the towns in which the repeat run privilege was granted in the Crescent case were towns in which the defendants used no second run. In the case here the testimony affirmatively established that appellees obtained second run privileges only in the towns where they needed second run pictures. There were no unreasonable clearance provisions in the contracts. Each contract contained provisions which enabled the distributor to require the exercise of the privilege within a reasonable time. The evidence further shows that the privilege was not obtained for the purpose or with the effect of tying up product in order to deprive a competitor from obtaining it. It was not an unusual contractual provision. There is no evidence that it was obtained by coercion or that appellees combined in the licensing of pictures for the purpose of obtaining that privilege.

The selective second run contracts were not unusual. They were in line with the general sales practice (R. 1348).[4] Among the few second run contracts of independent exhibitors, which were placed in evidence, practically all of them were selective contracts covering from nine to eighteen pictures out of the total releases of a distributor for a season (Pltf's. Ex. 69, O. R. 4007; 112, O. R. 4029; 113, O. R. 4030; 115, O. R. 4032; 198, O. R. 2057). The provisions of the printed form of contract, above referred to, furnished a method for the selection of the pictures which the exhibitor desired to play, and made it possible for another exhibitor to freely license any of them, which were not

used. Thus, on November 1, 1937, Metro licensed to Mrs. Berry, Amusement's competitor in Norman, fourteen features of the 1937-38 product for second run exhibition (Pltf's. Ex. 288, R. 2072, Ev. R. 696). That contract was made at a time when Amusement had a selective contract for thirty features with Metro (Pltf's. Ex. L-6, R. 2264). In Ada, Enid, Lubbock, and Shawnee, the independent exhibitors licensed and played subsequent run major pictures. There was no evidence from any of them that they were unreasonably delayed in either licensing or playing such pictures (R. 535, 542, 551, 557, 562, 944, 945, 947, 950, 597, 599, 600, 601, 602, 489, 490, 494, 521, 522, 898).

The selective second run privilege did not operate as an unreasonable restraint of trade. It was a normal and customary privilege and can create no inference that appellees combined in licensing pictures for the purpose or with the effect of obtaining that privilege.

Free second runs. Appellant's assertion that distributors frequently made no charge for second runs, which were licensed to appellees, is not supported by the contracts to which reference is made. In some instances the allocations of film rentals are attached to the contracts which were introduced in evidence. In other instances the allocations or deal sheets are not in evidence, but there is no evidence that they were not made. Wherever the allocation sheets are attached, they show that prices were allocated to second run. The fact that some of the contracts state that the second run rental is included in the first run rental does not mean that the second run pictures were licensed free of charge. The witness, Kupper, Fox's general sales

manager, explained that the first and second run rental were coupled together in the Fox contracts for the purpose of securing to the distributor the maximum amount of revenue at the earliest date; that the exhibitor not only paid rental on the second run pictures, but paid the rental at the time the rent was paid for the first run. The Court asked the question, "I understand you to say you did make a charge for the first run and made a charge for the second run." Kupper answered, "That is right" (R. 1350). Those provisions of the contract were required by the distributor for its benefit and were not demands made by the defendants for their benefit. They did not operate to the detriment of any independent exhibitor or create an inference of exertion of buying power.

Elimination of foreign made pictures. The privilege of eliminating foreign made pictures was available to any exhibitor, independent or otherwise, who desired it (R. 1337). There was no evidence that any exhibitor was required to license foreign made pictures. The agreement for the elimination of such pictures did not unreasonably restrain trade, and, as the privilege was available for any exhibitor, there was no discrimination.

Failure to specify minimum admission prices. In some of appellees' contracts admission prices were not stated. The failure of a distributor and an exhibitor to agree on the minimum admission prices to be charged does not unreasonably restrain trade. In fact, appellant is now asserting the reverse, and is contending that an agreement fixing a minimum admission price constitutes an unreasonable restraint of trade. If the failure to insert

admission prices in any of appellees' contracts is material here, it must appear from testimony other than from the contract itself. It was not uncommon for licensing contracts to have the admission prices omitted. The evidence was that the distributors ordinarily did no more than attempt to insert in the blank spaces in the exhibition contracts the admission prices which the exhibitor was currently charging. Evidence of any discrimination in regard to the failure to specify minimum admission prices is completely lacking. The failure to insert the minimum admission price clause resulted either through inadvertence (R. 1377), or because of an understanding that the admission prices, currently being charged or contained in previous licenses, would be continued. In either event the distributor considered that the exhibitor was obligated to continue to charge its current admission prices (R. 1377, 1545, 1912).

Appellant contends that the omission of the minimum admission price clause in appellees' contracts resulted in "price cutting activities" in Ada, Enid, Hobart, Lubbock, Sapulpa, Seminole, Shawnee and Wewoka. In that connection attention is called to Finding No. 24 (R. 126), in which the Court found that both the defendants and their competitors indulged in the use of bargain prices and price reductions, ordinarily practiced to secure patrons in their theatres, particularly in Ada, Enid, Seminole, Shawnee, Wewoka, Sapulpa and Lubbock, and that those practices were acts which normally flow from competition, particularly, in abnormal times when competition becomes keen, such as existed during the period involved here; that none of the practices upon the part of the defendants were in-

dulged in with the intent or purpose to crush or destroy competition, but was done for the purpose of meeting, in the ordinary and natural way, the practices of rival exhibitors. The Court heard the verbal testimony of the witnesses in regard to that matter and arrived at the above conclusion. The finding is supported by ample evidence (R. 940-41, 603-606, 1656-1659, 991-992, 1672, 886, 888, 889, 890, 634, 636, 564, 566, 535, 536, Deft's. Ex. 133, O. R. 5511, Ev. R. 1647, 1651, 1680). During the same period, appellees made similar bargain prices for the purpose of stimulating trade in towns in which there was no competition (R. 1659). If an exhibitor desires to increase his business, he has a perfect right to endeavor to do so by increasing the quality of the program or by decreasing the price, or both. Giving the consumer more for his money in order to increase an exhibitor's business has never been considered to be a violation of the Sherman Act, even though it may make it difficult for a competitor to survive. *Sinclair Refining Co.* v. *Federal Trade Commission* (C. C. A. 7), 276 Fed. 686, 688. When an exhibitor endeavors to increase his business by giving the patron more for his money the tendency is for the competitor to do the same thing or resort to some other competitive plan. Such competition tends to increase the business of each of the competitors. In such cases it frequently happens that neither competitor is injured and, through an increase in the volume of new business, the profits of each of the competing exhibitors may be increased. That is particularly true during a period of depression. It is important to note that there is not a word of testimony from any witness to the effect that his business was less profitable during the period of price reductions, "pal days," "penny days," "two-for-ones" and other

similar bargain policies. It is common knowledge that during the depression the exhibitors generally, in order to maintain attendance, resorted to all kinds of devices to attract the public. There was no thought of eliminating competition. It was a question of survival. There is no foundation for appellant's contention that, by reason of the omission of a minimum admission price clause in appellees' contracts, they were able to reduce prices which their competitors could not do. In each of the situations mentioned, the competitors were playing product of major distributors and commenced the bargain prices and continued them during the entire period when a defendant exhibitor was giving bargain prices.

In Ada both Miss Kyser and Amusement were playing major product, and both operated for a time on a policy of admitting two persons for the price of one, plus a penny on the mid-week change of program. Miss Kyser, the independent exhibitor, under her contract, did exactly what Amusement did under its contract. There was no testimony that any distributor treated Miss Kyser any differently than it treated Amusement (R. 940). During that time Miss Kyser was playing the product of RKO, United Artists, Universal, Metro and Fox, and she continued the policy for a period of about two years (R. 935-6). The town of Ada had three theatres when an oil boom came along and, at the height of the boom, each exhibitor opened another theatre (R. 941). The boom subsided and along came the "recession" in 1938 when there were five theatres competing for the business with the theatre attendance in a slump. One of the exhibitors thought it good business to offer a bargain day on

the mid-week program when the attendance was the lowest. The competing exhibitor established a similar policy. Miss Kyser did not claim that her net income was adversely affected by the practice, and there is no evidence that the stimulant did not result in greater attendance so that otherwise vacant seats would be filled and people, who would otherwise have seen only one show a week, were induced to see two or three.

The price reductions in Enid did not start with Amusement. When Gray returned to Enid in 1937, as competitor of Amusement and Shield, he opened the Rivoli (renamed the Royal), after having previously sold his theatre to his partner, Shield. He knew that Shield was operating the Royal on a policy of two admissions for fifteen cents on every Wednesday-Thursday and "Country Store" on Saturday night (R. 605). About the middle of 1938 Amusement occasionally ran double bills at the Criterion for the admission price of twenty cents and twenty-five cents, but there were no regular double bills. About June, 1938, Gray adopted a policy of playing double bills on Sunday-Monday-Tuesday at ten and fifteen cents. Shortly thereafter, Shield countered with a policy of double bills on Sunday-Monday-Tuesday at ten cents and continued his two admissions for fifteen cents on Wednesday-Thursday and "Country Store" on Saturday night. Gray then commenced a policy of two-for-one on Wednesday-Thursday along with his double bills. His plan was to admit two persons for fifteen cents when they presented a newspaper ad or theatre calendar, and that policy continued until June or July of 1939. Sometimes the policy was continued during

the week. It was not until the middle of January, 1939, that Amusement commenced to offer its bargains, after both Shield and Gray had been giving bargain admissions for many months (R. 603-605). At that time Amusement commenced to present double bills at the Mecca on five days of the week, and admission to the Mecca was reduced to ten cents. The circumstances under which it offered bargain admission in Enid present a good example of the use of bargain prices to create new business, as distinguished from the desire to ruin a competitor's business. On November 16, 1938, Amusement opened the Cherokee which was a newly constructed theatre having 950 seats and modern in every detail. At that time it was also operating the Mecca which, prior to the opening of the Cherokee, had been operated as a second run house. The Cherokee was constructed with the idea of operating it as a second run theatre on the theory that its large seating capacity would permit the showing of second run pictures at lower admission and result in a great increase in theatre attendance. However, it was opened on a "B" policy and continued to operate on that policy until the middle of January, 1939. The Criterion, which had been operated as a "B" house, was changed to second run house, and the Mecca became a subsequent run house. About the middle of January, 1939, the original plan for the Cherokee was carried out, and the "B" operation was changed back to the Criterion, and the Mecca continued as a subsequent run house. The Cherokee did a fine business, but the patronage of the Mecca decreased. In order to stimulate the business at the Mecca, the admission price of that theatre was reduced to ten cents for a time, but the policy was discontinued about the first of June, 1939. A

policy was then adopted that was similar to the two-for-one which Shield and Gray had been using for many months. The policy was to give a free ticket to the Mecca for every ticket bought at the Cherokee. That was discontinued about the first of July, 1939. The result of that policy was that the business of the Mecca increased without hurting the business of the Cherokee, and the Mecca was placed on a successful operating basis (R. 1656-8; 1671-2). The record does not show what product Shield was playing during the period of at least two years when he was operating on bargain prices, but Gray was playing product of Universal, Loew's, Fox, Paramount, RKO and United Artists, and he continued to play pictures for less than fifteen cents adult admission from June, 1938, until he sold his theatre (R. 604-5). He had various bargain offers for at least a year, whereas, Amusement had bargain offers from about the middle of January, 1939, until about the first of July, 1939. Gray did not testify that his business operated less profitably because of the bargain admission prices. He did not testify that he sold his business because he was operating at a loss.

In Hobart there was no reduction by Amusement of its admission prices. Amusement opened the Kiowa in November, 1934, charging ten cents for children and fifteen cents for adults, and continued that policy for eight or nine months. At that time the Oklahoman, operated by Mahone, under receivership, was charging ten cents for children and twenty-five cents for adults. He immediately opened his balcony and fixed a fifteen cent adult admission price for the balcony and continued the twenty-five cent

charge for the main floor. After the Kiowa had been operating for eight or nine months, its admission prices became ten cents for children and adults fifteen cents for matinee and twenty cents for evening (R. 991-2).

In Lubbock there was no evidence of price cutting by Lindsey Theatres, Inc. but Smith & Bearden, its competitors, operated the Tech on the policy of a special students' rate and "Pal Day" commencing shortly after the Tech was opened in June, 1936, and they continued that policy until sometime in 1941, when the partnership was dissolved, although running major product (R. 486-91). The Cactus had "buddy night" and Midway had "free view." Both were independent exhibitors (R. 527). During that time the Tech was playing product of Metro, Universal, United Artists, Columbia, RKO, Warner, Fox and Paramount (R. 488-490). The contracts with those major exhibitors did not prevent the Tech from operating on bargain prices for a period of more than four years.

In Sapulpa there was no evidence that Consolidated at any time operated on an admission price of less than ten cents for children and fifteen cents for adults. Moulder, Consolidated's competitor, testified that he believed that Consolidated had a bargain price of two-for-one at the Yale for a time, but he was not certain (R. 636). Moulder played double bills on Wednesday - Thursday - Friday - Saturday, while the Consolidated was playing single bills, and had a fifteen cent adult admission price for his balcony (R. 938-9).

In Seminole there was a period, not fixed by the evidence, when Amusement's competitor, Love, claimed that a free pass to the Rialto was given with each admission to the

State; thereupon, Love reduced his admission price to ten cents for adults (R. 890). Love opened his theatre in Seminole in 1936. During that time he was playing product of at least one major distributor (R. 882). There was no testimony that any major company refused to license him pictures because of his admission price policy. In this town Love started the bargain prices by adopting the policy of admitting two-for-one on the Wednesday-Thursday change, and when Amusement started the policy of giving free passes to the Rialto with each admission to the State, Love reduced his admission price to ten cents (R. 890).

In Wewoka, the Pix, which Love bought in April, 1938, was charging ten cent admission price at the time it was purchased by Love. During 1939 Love started the policy of admitting two adults for sixteen cents. Thereafter, Consolidated commenced a two-for-one policy. During that time Love also had "Family Night" and other similar bargain prices. During that period he was playing the product of at least one major distributor (R. 889). There was no testimony that Love's revenue in either Wewoka or Seminole was lessened by reason of the bargain prices.

Shawnee is the only place where any exhibitor testified that he was forced to discontinue the playing of any distributor's product at an admission price of less than fifteen cents for adults. As early as December, 1935, Jones' Ritz was being operated on a policy of admitting two adults for sixteen cents. Defendant's Exhibit 173 (O. R. 5595, Ev. R. 1937) shows that during all of the year 1933-34, the Ritz was operating on a policy of two-for-one. During that time Momand was operating the Odeon on a ten cent policy and

also had "Pal Day" (R. 564-5). Jones and Momand both competed with Amusement which operated the Rex on a ten cent admission policy during most of 1933 and 1934 (Defts'. Ex. 171, O. R. 5585, Ev. R. 1937). The evidence does not show when those policies were discontinued by either of the theatres. The evidence does show that the Rex was replaced by the Avon on March 1, 1936, and the admission prices of Amusement during 1936 in the Avon were: Children—ten cents, and adults—fifteen cents (R. 535). Jones complained to Fox about the playing of pictures by Amusement at the Rex for ten cents, and Fox advised Amusement that it must correct its policy or it would not serve it pictures (R. 1378). Since 1935 Jones played on a policy of "Penny Day" on mid-week program (R. 566). During that time he was playing pictures of Metro (R. 581), Universal (R. 534), United Artists (R. 539), Fox (R. 538), Columbia (R. 555), and Warner (R. 556-7). There is no evidence that any distributor, other than Fox, required him to discontinue playing its product at bargain prices. Fox refused to ship Amusement, as well as Jones, until it corrected its policy (R. 1378, 1800, 1839).

In each of the situations, which appellant has referred to, the independent competing theatre was cutting prices at the same time that the defendant operating in that town was offering bargain prices, and was doing so at a time major product was being played. Regardless of any control which any distributor may have attempted to exercise, and even though the use of bargain prices may have been in violation of the exhibitor's contract, there was no violation

of the Sherman Act in resorting to that method of competition under the circumstances in evidence here. There is no evidence that the admission price clause was omitted from any Griffith contract because of any demand by appellees, or because of any exertion of buying power.

Agreements fixing admission price. Appellant now contends that the contracts between the several appellees and the several distributors violated the Sherman Act because they contained agreements which fixed the admission prices which would be charged for the exhibition of the pictures licensed. That contention is not within the issues of the Complaint. The case was not tried on the theory that such an agreement between an exhibitor and a distributor, who licensed the copyrighted picture, was violative of the Sherman Act. As heretofore stated, the gist of the Complaint herein was that the defendants combined to compel the distributors to enter into contracts with them which granted exclusive privileges set out in Paragraph 42. It was not contended that the clause, fixing the admission prices to be charged by the defendants, was one of the privileges referred to. It was charged that the exclusive privileges set out in Paragraph 42 of the Complaint enabled the defendants to force competitors to maintain admission prices higher than those warranted by the quality of the entertainment they were able to offer (C. 43, R. 7).

During the trial counsel for appellant contended that the admission price clauses in the defendants' contracts were similar to those involved in the *Interstate* case, 306 U. S. 216, where the exhibitor defendant wrote a joint letter to the several distributors, advising that unless the distri-

butors agreed to sell their pictures to subsequent run competitors, conditioned that a smaller admission price than 25 cents would not be charged, they would not agree to license the distributors' pictures for exhibition at their first run houses at the admission price of 40 cents (R. 331, 332). There is no such admission price agreement in any of appellees' contracts. There is no evidence of any such demand by any appellee. In no contract of appellees' involved herein was there any agreement in any way relating to admission prices which were to be charged by competitors or requiring any distributor to impose such terms on any competitor. In the case here there was no evidence of any conspiracy among the distributors to fix prices, and no evidence of any price fixing scheme. So far as the evidence in this case shows, the price fixing agreements applied only to pictures covered by the particular contract under which the copyrighted pictures were licensed for exhibition and only to the exhibition of those pictures by the licensee in its theatres. No contract attempted to restrict the admission prices on subsequent exhibition at other theatres of the films covered by the contract. We do not understand that such an agreement, in the absence of evidence of a price fixing scheme, was held to be illegal in *U. S.* v. *Paramount*, 66 Fed. Supp. 323. However, if such agreements are illegal, we submit that such question was not within the issues tried below, it was not presented to the trial court for determination and, consequently, no error was assigned in connection with it.

Lump sum rentals. Appellant contends that appellees licensed pictures for a number of theatres in a number of

towns for a lump sum rental, and thereby competing exhibitors were placed at an unreasonable disadvantage, citing *U. S. v. Paramount, supra.* This alleged violation of the Sherman Act likewise was not within the issues in the case here. It was not one of the exclusive privileges which was alleged to have been obtained by the defendants, and the defendants were not charged with violating the Sherman Act by reason of licensing pictures in a number of towns and theatres for a lump sum rental. Neither the original Complaint nor amendments contained in the Bill of Particulars brought that matter into this case. We also submit that this matter was not assigned as error as required by rule 9.

Appellant offered no testimony as to how the lump sum amounts, which were set out in appellees' contracts, were made up. The only testimony in that regard was given by the witness, Kupper, general sales manager of Fox, in a detailed explanation of how contracts were negotiated between him and the representatives of appellees. He testified that he would make up a long sheet in which he listed every one of the towns for which a contract was being negotiated, and would go down the list of towns and put down the rental agreed upon opposite each town, and would then total those amounts. In that way he arrived at the amount which was inserted in the memoranda contract opposite the particular group of pictures of a specified class (R. 1433, 1434). Later individual contracts were prepared for each town, and in that individual contract the rental for each picture was separately set out. Metro likewise prepared individual contracts for each town. One of

the deal sheets, referred to by Kupper, is in evidence (Pltf's. Ex. F-4, R. 2211, Ev. R. 370). Similar work sheets were prepared by Metro and, in some instances, those sheets were attached to the memoranda contracts (Pltf's. Ex. L-6, R. 2272, Ev. R. 379). While the evidence does not disclose whether or not individual contracts were prepared by other distributors, it does appear that Paramount, Columbia, RKO and Universal prepared similar deal sheets (Pltf's. Ex. C-6-N, R. 2172; P-5, R. 2342-47; U-3-C, R. 2481-82; RKO-46, R. 2454). Appendix "A" of appellant's brief purports to be Exhibit C-5-R and reference is made to R. 2143-46. The part of the exhibit which has been copied includes only four pages of the exhibit which is introduced in evidence. The exhibit which was offered is C-5-A to J, inclusive. The exhibit, as a whole, was received in evidence (R. 392). It appears in the record (R. 2143-2155). Pages G to J, inclusive (R. 2151, 2156) are the deal sheets which were attached to that contract. Those deal sheets set out the details of the terms, such as film rental and playing time applicable to each picture in each town. In those contracts the licensing terms for each picture in each theatre, in which it would be played, could be ascertained with as much certainty as though an individual contract had been drawn. It is apparent also that those deal sheets made it possible for the distributor to know the amount of rental attributable to the playing of each picture on each run in each town.

In *U. S.* v. *Paramount, supra*, the Court stated that the independent theatre owners would labor under a great disadvantage in attempting severally to match or outbid the offers of a circuit which was making offers

for all of its theatres. It has never been recognized that a violation of the Sherman Act occurs because a competitor is placed at a disadvantage due to a particular method of doing business on the part of his competitor, or because such method of doing business makes it difficult for others to do business successfully. In *Prairie Farmers Publishing Co.* v. *Indiana Farmers Guide Publishing Co.* (C. C. A. 7), 88 Fed. (2d) 979, 982, the facts were that five publishers got together and quoted a lump sum rate which was lower than the separate rate offered by each. A competing publisher complained that it was an unreasonable restraint of trade, and that it was placed at a great disadvantage in attempting to match the rates offered by the five publishers. The Court held that, although the competitors were placed at a great disadvantage in attempting to compete against the lump sum rate, there was no violation of the Sherman Act. In *Federal Trade Commission* v. *Paramount Famous-Laskey Film Corporation* (C. C. A. 2), 57 Fed. (2d) 152, 157, *supra*, it was said, "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not, of itself, sufficient to brand the method of competition as unlawful and unfair." To the same effect are *Arkansas Brokerage Co.* v. *Dunn & Powell* (C.C.A. 8), 173 Fed. 899, 901, 903; *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 582.

In *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, this Court said, "It will not do to analogize this case to a case where purchasing power is pooled so that the buyers may obtain more favorable terms. The plan here was to crush competition and to build a circuit for the exhibitors." The trial

court in that case stated that United Artists for certain seasons made contracts for certain of its pictures with the defendant exhibitors and their affiliates for a lump sum and referred to the contracts as blanket contracts. As to those contracts the trial court said, "In each of these contracts the price for the pictures is fixed in a lump sum in all situations covered by the contract with no allocation as to the respective individual situation." (Finding No. 165). In Finding 169 it was stated that the blanket contract for the season 1938-39 was for 61 situations and for the 1939-40 season was for 73 situations. In Finding 170 the Court said, "Such contracts above mentioned did not, in fact, suppress or restrain interstate commerce or create, or tend to create, a monopoly in the exhibition of motion pictures in the territory covered by the bill." Although the Government appealed that case to this Court, there was no appeal from the above findings.

In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498, this Court said, "This Court has since repeatedly recognized that the restraints at which the Sherman Law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law." The common law never recognized that the sale of property in large quantities to one individual or a group of individuals for a lump sum price was illegal. It has always been generally recognized that the owner of a quantity of property might sell the entire quantity for a lump sum amount to any person or group of persons without violating any law. In no instance has anything, comparable to the licensing of a number of pictures for a number of

theatres for a lump sum amount, been held to violate any law.

If appellees had demanded that a distributor license its product to all of its theatres as a condition to the licensing of pictures in any theatre, or if appellees had conditioned the licensing of pictures in one or more of its theatres or towns on the licensing of pictures to it in another town or towns, such conduct would have constituted a violation of the Sherman Act. There is no evidence of any such act on the part of the appellees. The evidence affirmatively shows that the distributors did exclude theatres of the several corporate defendants from the licensing agreement where-ever they desired in order to license features to the appellee's competitors. There was no demand on the part of appellees to include such towns, and there was no attempt to coerce any distributor to include such theatres. The fact that numerous theatres were included in one contract and that the rentals were stated in a totaled amount in some of the contracts, did not prevent the independent exhibitor from licensing the pictures in those situations. The fact that distributors did grant priority of run to independent exhibitors in some of the competing towns should constitute conclusive evidence that the lump sum rentals, which were contained in the memoranda contract, did not prevent the distributors from licensing pictures to competitors of appellees or place such competitors at a disadvantage in licensing pictures. In the contracts of appellees the lump sum rentals merely reflected the sum total of rentals for theatres in such towns as each distributor, in the

voluntary exercise of its judgment, determined to include in its negotiations with appellees.

Appellant has quoted one sentence from the testimony of Sears, sales manager of Warner. Sears' testimony does not support appellant's contention that Warner licensed its pictures to appellees in preference to their competitors because the rentals in individual towns were small in comparison with the total of the rentals in the several towns of appellees. Sears testified that in each town his company selected a customer and continued to license to such customer as long as the account remained satisfactory without first negotiating with other exhibitors (R. 1513); that in the selection of a customer the same factors were taken into consideration without regard to whether the customer was a member of a circuit of theatres or operated in only one town; that many factors were involved in the selection of a customer but the prime factor which was considered by his company was the revenue; that he considered the amount of revenue that his company could get out of a particular theatre for a particular town to be the prime consideration (R. 1494, 1495). The attorney for plaintiff propounded this question: "So that in so far as the particular independent is concerned, even if he were prepared to give you a deal which would yield substantially more in that particular town than what the circuit was giving you there, you would reject that deal in favor of the circuit as it meant losing the circuit deal; is that right?" The witness answered: "I would have to take into consideration the expense involved in soliciting all of these particular opposition accounts and see whether or not I was going to get all of them

as against the one sale of the particular circuit" (R. 1504). That question was conditioned on what would have been given consideration if the selection of an independent exhibitor in one of appellees' towns had meant losing the deal in all of the other towns of the circuit. There is no evidence that, in the deals, which were made by Warner with the appellees, there was any threat that appellees would not license pictures for the other towns if Warner licensed pictures to a competitor in one or more towns. In the absence of any such condition, it was only necessary, according to the testimony of Sears, that his company ascertain the best net revenue obtainable in each particular town. Such net revenue in the particular town would be the prime consideration in selecting the customer (R. 1494, 1504). There was no evidence that Warner failed to give the revenue in the particular town prime consideration in each town which was included in appellees' contracts.

Appellant has also referred to the testimony of McCarthy, Universal's sales manager. McCarthy testified that there were a number of conditions that entered into the choice of his company of a customer in a particular town; that in one town one of the factors might be the determining factor, while in another some other factor might determine the choice of customer (R. 1542). He testified that in determining whether his company would sell to an exhibitor member of a circuit or an independent in a particular town, his company would sell to its regular established customer in that particular town; that in the event his company had an established account with an independent, it was not the policy of his company to sell away from that account just

because a circuit was operating a theatre in that town or because more revenue could be obtained from the entire circuit than could be obtained from the independent operator in that town (R. 1554). He further testified that in the negotiations with the defendants, there was no threat that product would not be licensed for other towns in the event the theatre or theatres of a particular defendant in a given town were not selected as against the opposition (R. 1555). The witness stated that when a deal was made with appellees for 1936-37 season, after it had failed to make a deal for the previous season, the question of getting back into the circuit, as a whole or not at all, was never brought up and the deal was negotiated without including the town of Hobart in which Amusement's competitor was its established account (R. 1557); that the deal with appellees for the 1936-37 season was presented to appellees by his company and solicited by his company for the towns which were included in the contract—towns in which one of appellees had been Universal's regular customer—and there were excluded from the negotiation and contract such towns as his company desired to exclude (R. 1558).

The trial court heard the evidence of witnesses as to the type of theatres which were operated by the competing exhibitors and by appellees, and had in evidence photographs of all of the theatres in every town in which there was competition. The evidence also showed the type and character of the several exhibitors in those towns. From that evidence it clearly appeared that each distributor in the situations, in which its product was licensed to appellees, would have made the same selection of

customer if the defendant corporation, who owned that theatre, had been operating as an independent instead of a circuit.

Master contracts. The so-called master contracts between appellees and various distributors were merely memoranda agreements entered into between the distributor and exhibitor at the close of negotiations for the licensing of pictures. Those memoranda agreements were used for the convenience of the parties (R. 1325). The master contracts between appellees and Fox and Metro were merely letter memoranda, setting forth the terms which had been agreed upon and as soon as convenient individual contracts on the standard printed forms for the theatres in each town were prepared and executed. The other master contracts consisted of typewritten sheets, to which the printed form of contract was attached and there were also attached deal sheets, setting out the terms of the agreement as to the theatres in each of the towns. The master contracts were not different from contracts entirely written on the printed form, except as to the number of towns and theatres included in the one contract. The real details of every contract between a distributor and an exhibitor are attached to the printed form or written in the blank spaces in the printed form (R. 1325). The printed form merely covers the general provisions common to most contracts, and matters which are determined by negotiation between the parties must be written after negotiations have resulted in an agreement (R. 1551-1552). The picture or pictures licensed, the license fee—or the percentage, guarantee against percentage, guarantee against open or flat rental, the number of

days to be played and like matters are the result of trade and barter between the exhibitor and distributor and are not covered by the printed form. It follows that there was nothing illegal in the use of a typewritten memoranda for the purpose of supplementing the printed contract form.

The term "master contract" does not mean that the contractual provisions of any two or more documents, which may be referred to as "master contracts," are the same. The contractual provisions, which are agreed upon pursuant to the negotiations of the parties, will vary in each master contract, as in any other contract for the licensing of motion pictures. The illegality, if any, must be found in the substance of the contract and not in the form or the name which may be given to the contract.

Appellant contends that master contracts, which were in evidence in the *Crescent* and *Schine* cases, were substantially the same as those which are in evidençe here, and that they were condemned by the Court. That statement is not correct, and it is not supported by the record.

In the *Crescent* case the trial court expressly approved the use of master contracts which contained blanket rentals. In the *Schine* case there was no condemnation of master contracts as such. The Court there held that the defendants had combined to compel the granting of special privileges and with a wrongful motive. In the case here it is not charged that master contracts and franchises are, in and of themselves, illegal. The charge is that the defendants combined for the purpose of obtaining, through their contracts, certain provisions which are specified in Paragraph 42 of

the Complaint (R. 6). The trial court found that the charges were not true. In the *Crescent* and *Schine* cases the trial court held that the evidence did establish the charges contained in the Complaint. The illegality, if any, in a master contract or franchise must be found in the substance of the contract and not in the form or the name, which may be given to a particular document. In the instant case appellant was not entitled to prevail, unless it established that the appellees combined in the licensing of pictures for the purpose or with the effect of compelling the distributors to grant the special privileges specified in the Complaint.

Appendix A of appellant's brief is a portion of appellees' contract with Columbia for the 1936-37 season. It is not a complete copy of that contract. That which has been copied is merely the typewritten portion of the agreement which was attached to Columbia's standard printed form and to the "work sheets," which set out the rentals for the exhibition of each picture in each theatre in which it was licensed to be played. The typewritten portion of the Columbia contract is not, as asserted by appellant, illustrative of most of appellees' contracts. The Columbia contract required the payment of rentals for pictures which might be selected from the whole which would, in the aggregate, amount to a minimum total rental. It merely allowed the exhibitor to select from the total pictures released those which it desired to play, but required the selection of a sufficient number to produce the guaranteed rental. That was not an unusual provision. At least 80% of all Columbia contracts were selective (R. 1535).

The Columbia contract, in Paragraph (a), refers to the allocation of rentals in Exhibit A (R. 2145). In Paragraph (f) the exhibitor is obligated to deliver to the distributor detailed allocations "on all Columbia features and short subject product enumerated in this agreement as previously outlined" (R. 2145). The Columbia product for the 1938-39 season (Ex. C-6-G, R. 2165) provides that the individual allocations shall be determined by the distributor, and those allocations are attached to the contract (R. 2172, 2185-2188).

There is no contract between appellees and any other defendant which permits the appellees to allocate film rentals. There was nothing unlawful in the agreement in Exhibit C-5 whereby the exhibitor was accorded the privilege of allocating the rentals to the several theatres. As heretofore stated, that privilege was upheld in the *Crescent* case. That privilege did not prevent Columbia from dealing with any competing exhibitor. The undisputed evidence is that Columbia did license competing exhibitors its product in Sapulpa and Hominy during the entire period. The foregoing provision was no impediment to the licensing of pictures to appellees' competitors in any place where it desired to license them. Columbia's pictures were licensed prior to production. At that time it had only recently become a national distributor. The number of good box-office pictures which it produced each season was small and estimated by one of appellant's witnesses at two (R. 947). Under those circumstances the privilege of selecting pictures to be used and of allocating the rental to the particular towns was entirely reasonable. The printed contract which was a part of the Columbia contract, in Paragraph 6, contained

a clause which was substantially the same as Appendix B of this brief. That clause gave the distributor the right to require the exhibitor to select the pictures which it desired to exhibit within fourteen days after notice given by the distributor of the availability and further required that the exhibitor select an exhibition date within a period not exceeding thirty days thereafter. There is no evidence that any competing exhibitor was prevented or delayed in licensing Columbia pictures which were not used by appellees by reason of the selective privilege, or that Columbia was prevented from licensing pictures to a competitor of either of the appellees because of that provision, or because the rentals were stated in a guaranteed aggregate amount.

The failure of the master contracts to require the playing of any specified film in any specified theatre at any specified time is no special privilege. Contracts with all exhibitors for a season's product failed to make any such requirement. As the pictures were licensed before they were produced, it could not be foreseen when the picture would be produced, when it would be released, or when it would be made available by the distributor for exhibition in a particular theatre. Such a requirement in a contract for a season's product would have been absurd. The printed form of contract, which contained adequate provisions relating to the selection of play dates, was incorporated in all of appellees' contracts. The playing arrangements could be inserted either in the blanks, which were left for that purpose in the printed forms, or they could be contained in a memo or rider, as was done in the contracts with appellees. The amount of playing time and other details in the play-

ing arrangement would necessarily vary in each contract. In Exhibit C-5 the playing time, the run and the theatre, in which the picture might be exhibited, are set out on the first page of the typewritten memo (R. 2143). The provisions for availability and selection of play date are contained in Paragraph 6 of the printed form (R. 2192). There was nothing unusual in the agreement that a picture might be played in either of several theatres in a particular town. A like privilege was granted to independents who operated more than one theatre in a town (Pltf's. Ex. 276, R. 2065; Pltf's. Ex. W-1, R. 2505; Defts'. Ex. 69, R. 2699; Defts'. Ex. 262, R. 2673).

Appellant asserts that appellees' contract specified a starting date for the playing of pictures and gave the exhibitor generally a period of at least twelve months, commencing a few months after the commencement of the season in question, within which to play the pictures covered by the contract. It is further asserted that such provision prevented the licensing of pictures which were not used to a competing exhibitor. The undisputed evidence was to the contrary (R. 1461, 1497, 1498, 1500).

A provision specifying the time within which the exhibitor is to commence exhibiting the pictures covered by a contract and providing for the liquidation of the contract in a specified period, which frequently extends beyond the current season, was customary in contracts with independents as well as with appellees (Pltf's. Exs. 197 and 357, R. 2054, 2089; Defts'. Exs. 26 and 69, R. 2674, 2678, 2698). There is no evidence that any distributor gave appellees

longer to liquidate their contracts than it gave to independent exhibitors.

It is not a fact that "R. E. Griffith refused to agree to a clause requiring unused pictures to be released for exhibition by others within sixty days after they were made available to the circuit." In the negotiation of the contract between Universal and R. E. Griffith Theatres, Inc. and Westex for the 1938-39 season, he did refuse to agree to a clause which would have required him to make eliminations within sixty days after the release of the pictures. There is a vast difference between the release date and the date on which those pictures would be made available in the local exchange for use in the theatres in the small towns for which he was licensing pictures. He was willing to and did execute a contract which embodied the usual and ordinary clause in regard to the selection of play dates under which the elimination of pictures would be made when notice of availability was given by the distributor. The distributor could give the notice of availability at any time after the picture was received at the local exchange. (See Appendix B, this brief.)

Appellant has further asserted that the Paramount franchise was modified to contain a provision requiring the selection of pictures to be exhibited on second run within sixty days. That statement is correct, but the evidence does not support the further assertion of appellant that the modification was made by reason of a complaint to the Department of Justice by an exhibitor at Plainview.

Appellant, in Appendix C, has listed each of the contracts under which pictures were licensed for exhibition in

the theatres of the several appellees during the seasons 1934-35 to 1938-39, inclusive. In a column headed "Special Privileges" there have been listed a number of clauses of the several contracts. We again assert that no provision which has been listed by appellant constitutes an unreasonable restraint of trade. Each and every provision is such that it can reasonably be inferred that it was inserted as a result of the negotiations between the parties and without any motive or purpose of unreasonably restraining trade or crushing competition. Appellant has entirely failed to establish that any of those provisions were "special" in the sense that they were not inserted as a result of the usual and ordinary processes of negotiation and bargaining between a distributor and an exhibitor.

Appellant completely failed to establish that appellees combined in the licensing of pictures for the purpose or with the effect of compelling any distributor to grant any of the so-called "special privileges."

Franchises. It is not charged in the Complaint that appellees violated the Sherman Act by entering into franchise agreements with any distributor. The only question here is whether appellees combined for the purpose and with the effect of obtaining a franchise, that is a licensing agreement in the form of a contract for more than one season's product. This Court in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, 188, recognized that such contracts may be lawfully used. However, in that case it was held that the franchise contained provisions which unreasonably restrained trade and had the effect of extending over the period of the fran-

chise certain provisions of the annual agreements which were held to unreasonably restrain trade. In the case here the franchise, like the annual agreements, contained no provisions which were unusual or which unreasonably restrained trade. In *Chicago, etc. Railroad Co.* v. *Pullman Co.*, 139 U. S. 79, this Court recognized the validity of an exclusive contract for a longer period than is involved here, but in *U. S.* v. *Pullman Co.*, 50 Fed. Supp. 123, the Court held such franchises could be unlawfully used. There is nothing illegal in merely licensing the product of a motion picture distributor for a period of more than one year. Appellees were parties to only four contracts which extended for more than one season. Each was with a different distributor and was not renewed. The franchise with Metro was executed May 8, 1930, and expired with the season 1934-35 (Pltf's. Ex. L-1, R. 2238). The Paramount franchise was executed July 17, 1934, and was for a period of three years (Pltf's. Ex. P-1, R. 2298). The RKO franchise was executed March 19, 1935, and was for a period of three years (Pltf's. Ex. RKO-44, R. 2422). The Columbia franchise was executed September 14, 1937, and covered the product for two years (Pltf's. Ex. C-6-G, R. 2165). Appellees did not originate the idea of these franchises or solicit them. They were actively sought by the distributors from circuits and independents alike. At that time the distributors thought the franchises were desirable and, therefore, sought them. There was no distinction in the desirability of a franchise with a circuit as compared with an individual operator (R. 1523, 1910-11). Appellees at no time had franchises with more than two distributors. There was not a time when seven of the eight major distributors could not, within a short time,

license their product to someone other than Griffith. At all times there were six of the eight major distributors whose product was not under franchise. The defendants held no franchise at the time of the trial. Appellant asserts that the franchise with Loew's grants the privilege of adding new towns to franchises. The clause referred to is Paragraph 13 of Plaintiff's Exhibit L-1. That clause merely provides that if the exhibitor shall acquire any town, and if the parties to the franchise agree, after such acquisition, that it can be added to the franchise, and if rental prices for such additional town can be agreed upon, such rental prices shall be added to the guaranteed film rental for the purpose of determining the total of the guaranteed rentals and the excess revenue to which the percentage terms of the franchise are applicable. New towns could not be added to the franchise by the exhibitor but could only be included by subsequent agreement. Such was the construction which the parties gave to the contract. Griffith entered into Gallup after the franchise had been executed but Gallup was not added and, during the entire time of the franchise, Loew's product was licensed to Griffith's competitor. Although the franchise covered Hobart, that town was not restored when, in the fall of 1934, Amusement opened the Kiowa. Metro continued to license its product to Griffith's competitor.

Appellant lists, as a further "special provision" of Loew's franchise, the provision for "net profits to be split." Appellant has not attempted to argue that such an agreement was illegal or unusual. However, the original franchise, which was executed in 1930, provided for rental in a guaranteed amount with a split of the gross rental after the de-

ductions allowed in Paragraph 6 (R. 2238). Appellant failed to call attention to the fact that in 1933 the rental terms were amended to provide for varying percentages of the gross receipts without any deductions and without any kind or character of a split of net profits (R. 2240). For the period in this suit the rentals under the Loew's franchise were percentages of the gross receipts (R. 2240, 2243).

Appellant contends that the Paramount franchise granted the right to exhibit pictures in newly acquired theatres, and that such agreement unreasonably restrained trade. The clause referred to is found in Paragraph 13 in Exhibit P-1. It merely provided that if the exhibitor should open an additional theatre in any town covered by the franchise, it would be permitted to play any flat rental picture in such new theatre in the place of any of the theatres in that town named in the franchise. It further provided that if the exhibitor should build or acquire a theatre which, in the distributor's opinion, was "better than the present Class A theatre," the percentage pictures shall be presented in such new theatre. Those provisions were neither unreasonable nor discriminatory. The copyright law prohibits the exhibition of a picture in any theatre which is not covered by a license agreement. In making a contract covering a period of three years, it was reasonable that the parties agree that, as to pictures which were to be played on flat rental, a newly acquired theatre might be substituted for one of those named in the franchise. There is no evidence that Paramount ever denied such a privilege to any exhibitor who requested it. There is no proof that this privilege was ever used to the injury of any competi-

tor or that it was intended to so operate. In Paragraph 8 of the franchise it is provided that the exhibitor shall be released from those obligations to exhibit the pictures in any town covered by the franchise where exhibitor shall permanently close all of its theatres in such town. That privilege could not injure the competitor or restrain trade. The only person who could be affected would be the distributor who would lose the revenue from any town where all the theatres were closed. That provision would not apply unless all the exhibitor's theatres in the town were closed. The evidence discloses that there were a few situations of that kind, such as Earlsboro, and other oil boom towns which failed to develop. It was reasonable that defendants should have an escape clause applicable to such situations.

The original Paramount franchise contained a clause which provided that the distributor would, upon the request of the exhibitor, furnish to the exhibitor, without additional charge, a second run for not exceeding each of twenty towns. That clause was amended by supplemental agreement of September 22, 1936 (R. 2318-2321), which provided that the exhibitor shall be furnished forty feature length pictures * * * for second run in nine towns which were named. It further provided that all the pictures not selected within sixty days after national release date would be automatically released. That provision was materially different from the "repeat run" clause of the Paramount franchise in the *Crescent* case. In that case Paramount had requested the exhibitors to modify the clause of the original franchise so as to provide for the selection and playing of repeat runs within ninety days of the conclusion of the first

run exhibition. The exhibitors declined to make the modification, but finally agreed to make the selection within ninety days, with the further agreement for an additional 120 days after the first run exhibition within which to play the pictures so selected (Finding No. 119, *Crescent* case). In the instant case the modification required the selection within sixty days after national release date. Prior to the modification, the selection had to be made under the terms of the printed contract, which was a part of the franchise agreement, within thirty days after notice of availability. Neither provision was unreasonable or constituted an unreasonable restraint in the licensing and playing of pictures by the exhibitor's competitors. As we have heretofore seen, there is no evidence that Paramount, within a reasonable time after the availability of pictures in the local exchange, was prevented from licensing pictures to any exhibitor because of either provision.

There was no violation of law in the distributor agreeing with the exhibitor that, in consideration of the rentals that were being charged, the exhibitor would have the right to exhibit the pictures on first run and should also have the privilege of a second run in certain towns. That was the proper subject for negotiation and bargaining between the parties.

Appellant has called attention to a letter from Paramount to Jake Jones, dated October 2, 1934, in which it was stated, "It is against the company's policy at this time to write franchises." The Paramount franchise with the defendants was accepted by the distributor September 15, 1934 (R. 2312), but negotiations for a franchise were in-

itiated by Paramount and had been going on since prior to July 17, 1934 (R. 1913, 1774). It was not against the policy of Paramount to enter into franchise contracts at the time the negotiations for this franchise were entered into, but later it changed its policy and sought to discourage the sale of franchises (R. 1910).

Appellant has listed four alleged "special provisions" contained in the RKO franchise. It contained a clause which provided that, "If the exhibitor shall during the term of this agreement open additional theatres in any of the towns covered herein * * * any of the feature photo plays * * * may be exhibited therein in place of any of the theatres named therein." It contained a further clause which provided that, "The exhibitor shall be released from his obligation to exhibit photo plays in any town covered hereunder where the exhibitor shall permanently close all of his theatres therein" (R. 2431, 2432). Those provisions have been discussed herein in connection with the Paramount franchise.

The RKO franchise did not contain minimum admission prices and did permit the playing of pictures out of order of release. Both of those provisions have already been discussed.

Appellant refers to the fact that certain pictures, which were licensed to Amusement by RKO, were not played and were not released by it until 1937. It asserts that it shows that the distributors did not enforce the provisions of the printed contract by which the exhibitor could be required to select and date the pictures upon notice of availability

by the distributors. This case involves the transactions of the several appellees with eight distributors for a period of five years. The government, after combing all of the records of the distributors, was able to produce only this one instance in which it claims that pictures were not promptly eliminated by defendants. No exhibitor has asserted that any product, which he desired to play, was unreasonably withheld from him by any defendant, or that he had any difficulty in licensing, dating or playing pictures because of the failure of a defendant to promptly select, date and play pictures. The RKO pictures, to which appellant has referred, were licensed to the defendants under the RKO franchise. That contract gave the defendants the right to make selection from all of the pictures for first run exhibition, subject to the agreement that the defendant was to play sufficient pictures for the rentals to aggregate a guaranteed rental. It also provided for a selection of twenty-six pictures for second run exhibition in certain towns which were named. The list of unplayed pictures, which have been referred to by appellant, consisted of only two or three first run pictures in certain towns and a somewhat larger number of second run pictures in certain towns. Those were pictures which the defendant did not select for playing in those situations. We have seen that the RKO printed form of contract (Ex. RKO-67-20, R. 2464), which was part of the franchise, in Paragraph 7, provides for notice of availability, selection of play dates and arbitrary dating by the distributor if the exhibitor should fail to furnish a play date. Paragraph 21 (R. 2468) provides that in the event the exhibitor shall fail and refuse to select or desig-

nate a date for exhibition thereof, as in Article 7 provided, the distributor may cancel the contract and proceed to license the pictures to other exhibitors. RKO had full control of the situation and the request for a form of release was merely for the purpose of clearing the distributor's record. Amusement made its selection of the pictures it desired to use at the time notice of availability was given. The failure of RKO to clear its records was not the fault of the defendants (R. 1808).

The asserted "special provisions" in the Columbia franchise have been heretofore discussed.

As appellees did not seek those franchises and as the distributors were, at the time they were entered into, making franchises in the normal course of business with independents, as well as circuits, and as the terms and provisions of the franchises were not unusual or discriminatory, the making of those franchises does not evidence that appellees obtained them as the result of their circuit buying. It follows that there has been no violation of the Sherman Act as charged in the Complaint in this case, even though it should be held that franchises of that kind are *per se* illegal.

Appellees Did Not Conspire With Each Other or With Any Distributor to Prevent or Restrict the Licensing of Pictures By Competing Exhibitors.

Appellant urges that, independently of the licensing agreements, there existed agreements, between appellees and each of the distributors, which restricted and suppressed independent competition. The finding of the trial court was

against that contention (Findings 20, 21, 22, and 29, R. 125, 126, 127). There was no direct evidence of any such agreement, but there was direct evidence to the contrary. The finding of the Court is supported by ample evidence (R. 1358, 1364, 1365, 1368, 1370, 1372, 1373, 1374, 1375, 1376, 1495, 1524, 1545, 1560-61, 1761-2, 1765, 1767-8, 1770, 1774-6, 1778-9, 1782-3, 1784, 1792, 1830, 1831, 1871-2, 1912). Appellant contends that, notwithstanding the direct evidence, there were circumstances from which the Court should have inferred the existence of a conspiracy. We will now consider those.

Refusals of distributors to negotiate with exhibitors for runs not licensed by any other exhibitor. The evidence discloses that prior to the Consent Decree, some of the distributors refused, in some situations, to license second or subsequent run pictures which were not licensed to the first run exhibitor. Such refusals were not limited to towns in which appellees operated theatres or to competitors of appellees. The direct evidence, last above referred to, was that each distributor determined for itself whether it would license an additional run or runs in a particular town. In some towns an additional run was licensed to a competitor of the appellee. In others, some of the distributors refused to license an additional run. Appellees had nothing to do with any distributor's action in that regard and made no request of any distributor for such action. They had no contract, agreement or understanding relative thereto with any distributor. Each distributor, during that period, exercised its right to license or not to license an additional run in a town, depending on its individual judgment as to whether

such additional run would be injurious to its first run revenues (R. 1311-12, 1907). The refusal to license an additional run was not limited to towns in which appellees or circuits were operating. The determination of how many runs would be licensed in any town and whether an additional run should be licensed in a particular town required the exercise of judgment on the part of the distributor. There is no evidence that any distributor was wrong in limiting the number of runs to be licensed, but even if were, an erroneous exercise of judgment was not a violation of law. The distributor was the owner of the copyrighted product which it had a right to license or not to license. There were towns in which the distributor would expect to receive more revenue from only one run than if it permitted a second run in opposition to the first run. The same was true of third runs (R. 1311-12, 1907, 1908). There were many things which a distributor would consider in determining hcw many runs it would license in a particular town. He would consider the effect of the run on the revenue which it might expect to subsequently receive from prior runs; the effect on the first run exhibition of a picture by an outstanding star of the concurrent exhibition of a subsequent run picture by the same star; the net revenue which the distributor might expect to receive from the second and subsequent run exhibition; the expense of serving the additional account as compared with the anticipated revenue; whether the additional business, which would develop from the additional run, would tear down the business, which the distributor was enjoying in the licensing of its existing runs, instead of increasing net revenue from the additional run

(R. 1311-12, 1907). Each distributor sold as many accounts in each town as it thought it was good business to sell (R. 1458). Regardless of the reason for the distributors refusing to license an additional run, the evidence affirmatively establishes that in the instances in which a distributor refused to license its product to independent theatres, the defendants were not responsible for such refusal, and there was no coercion on the part of the defendants to bring about such refusal and no conspiracy or agreement between the distributors and the defendants whereby any product was refused to any exhibitor.

Refusal of distributors to negotiate with defendant's competitor for the continuance of a run previously licensed to such competitor. During the period here involved it was the practice of each distributor to select a customer or customers in each town to whom it desired to license a particular run of its pictures, and each season it negotiated with and endeavored to license its product to such exhibitor before negotiating with any other exhibitor. That was the normal practice (R. 1303-5, 1358-9, 1493, 1533-34, 1885, 1553). In licensing their pictures to appellees, the several distributors followed the normal practice. Appellant contends, however, that Paramount, having licensed its pictures to certain of Amusement's competitors in the towns of Ada, Duncan, Elk City, Hobart, Norman, Shawnee, Stillwater and to the competitors of Consolidated in Clinton for the seasons 1932-33 and 1933-34, departed from its normal practice when it returned to the customer of its choice in the season 1934-35. No town in which R. E. Griffith Theatres, Inc. or Westex operated is involved.

Consolidated, in the town of Clinton, and Amusement, in the other towns, were the established customers of Paramount prior to the season 1932-33, and continued to be Paramount's choice, although the product of Paramount was licensed to the competing exhibitor in each of those towns for two seasons. The failure to license to the established customer in those seasons was because of the inability of Paramount to reach an agreement with defendants as to rental terms and playing time (R. 1772-4). Those matters related to theatres in all of the towns and not to part of the towns. The result was that Paramount sold away from Amusement and Consolidated, the customers of its choice and its established accounts to a less desirable exhibitor in each situation. In each of those seasons, Paramount first negotiated with those defendants as the exhibitor of its choice and only licensed the competing exhibitors when unable to reach an agreement with them (R. 1909). The Court heard the testimony of the independent exhibitors in each of those towns and had before it evidence which established that in each town the theatre of Consolidated or Amusement was superior to those of the opposition and that Paramount had had long and favorable experience with those exhibitors. In the season 1934-35, when the product was again licensed to Amusement and Consolidated, appellee had no knowledge or information as to what negotiations, if any, had been carried on between Paramount and the exhibitors to whom the product had been licensed in the preceding season. Paramount voluntarily negotiated with defendants for the product in those towns, and there were no demands by defendants that those towns should be included

in its contract. Nor was the licensing of the Paramount product in non-competitive towns conditioned on the licensing of product in the towns where it had been licensed to competitors for the preceding year (R. 1775-6, 1908-9). Gallup and Sapulpa were the only competitive towns in which Paramount had an established independent account, in which the competitors could be favorably compared with defendants. In those towns Paramount in the 1934-35 season, and thereafter, continued to sell to the independent customer and has continued to do so throughout the years (R. 1909). Appellant contends that in the town of Hominy, Paramount sold away from its independent customer for the season 1937-38. Consolidated did not enter the town of Hominy until June 14, 1936 (R. 421). For the season 1935-36 the Paramount product was licensed to McClain, who was operating the Ritz Theatre in competition with the Pettit, which was operated by Vincent. The Pettit did not have Paramount product for the 1935-36 season or for the 1936-37 season. The "sell-away" from the Pettit took place prior to the time Consolidated acquired any interest in Hominy (R. 514).

Relative to the alleged sell-away by RKO for the season 1935-36 in some towns, the evidence discloses conditions which are similar to those above related (R. 1779-1781). For the season 1934-35 RKO was unable to reach an agreement with defendants for its season's product, and wherever possible it licensed its product to competing theatres. The stumbling block in the RKO negotiations was the demand of RKO that the pictures be licensed on a very high percentage or on flat

rentals increased 100 per cent (R. 1781). In neither of those towns was the independent exhibitor an established customer of RKO or its choice of customer for that particular season, and failure to license its product to defendants was due entirely to an inability to agree on rental terms (R. 1522, 1781).

In Hominy RKO continued to license its product to its regular customer, Vincent, and never offered it to Consolidated (R. 502). In Hobart RKO, in the early part of 1934, entered into two contracts with Mahone who was the receiver of the Oklahoman Theatre for the 1934-35 and 1935-36 product (Pltf's. Ex. 357, 358, R. 2089, 2094). The RKO product for the 1936-37 and 1937-38 seasons was licensed to Griffith Amusement Company under the franchise executed in March, 1935 (Pltf's. Ex. RKO-44, R. 2422). At that time the Oklahoman was still in receivership (R. 981). It does not appear that Mahone, prior to the receivership, was ever the customer of RKO. Mahone had used the product of RKO in the Oklahoman during a portion of the time that theatre was in receivership, but he could not be considered a regular customer. In the normal course of events, the Oklahoman would be sold at receivership sale and there was no assurance that Mahone would continue to operate it, as he had disposed of that theatre and other theatre interests in Hobart in 1930. The theatre was sold by the receiver in 1935 (R. 983) When Amusement, which had been a customer of RKO for a long time, opened the Kiowa, which was a fine deluxe theatre, it was reasonable that RKO would, under the circumstances, license its product to Amusement for use in the Kiowa in preference to licensing it for use in a theatre then

being operated under receivership and which would shortly be sold. The execution of the franchise was not conditioned upon the inclusion of Hobart and the product of RKO was voluntarily licensed to Amusement for the two seasons mentioned (R. 1779-1782).

Appellant contends that Universal in the season 1936-37 sold away from defendants' competitors in the towns of Ada, Brady, Clinton, Duncan, Enid, Gallup, Norman, Shawnee and Stillwater. In each of those towns, with the exception of Brady, Amusement or Consolidated were the regular customers of Universal, but in the 1935-36 season, they were unable to reach an agreement upon rental terms, and Universal licensed its pictures wherever possible to competing exhibitors (R. 1784-1785). For the next season, however, Universal voluntarily negotiated with defendants for its product in those towns and, being able to reach an agreement as to rentals, licensed its product to defendants, its established customers (R. 1543-4, 1785, 1786, 1792). Westex became interested in theatres in Brady in June, 1935, and first licensed pictures for those theatres for the 1935-36 season. Morgan acquired an interest in a competing theatre in December, 1935, and operated it until November, 1936 (R. 1028-31). When Morgan purchased the Ritz, that theatre had under contract, for the 1934-35 season, product of Universal, United Artists and Columbia. Morgan played out Universal and United Artists contracts, but played only a few of the Columbia pictures. United Artists solicited him to purchase pictures for the 1935-36 season, but he was unable to agree on terms and made no contract. He did not approach Universal or Columbia in an

effort to license their pictures for the 1936-37 season (R. 1031-32), and, as stated above, sold his theatre on November 12, 1936. Prior to acquiring the Ritz, Morgan had operated theatres in six towns and had left unplayed pictures in those towns (R. 1041-42). Morgan had never been a customer of Universal in this town and his previous history indicated that he would not become a satisfactory regular customer at any place. In Hobart, Universal has continued to license its product to Mahone and has never offered it to Amusement (R. 982, 1005, 1784).

Appellant asserts that Fox and Warners sold away from Nagle in Gallup for the 1932-33 season. Nagle did not license Fox or Warner product for the season 1931-32 and there is no evidence that he was ever a regular customer of either of those companies (R. 750). For two seasons prior to the period involved in this suit, R. E. Griffith Theatres, Inc. had been the customer of those distributors in that town. In Hobart, Sapulpa and Plainview, where Fox had established customers before Amusement, Consolidated or Westex entered those towns, Fox continued to license its product to those customers on the run they had always had and did not offer it to defendants (R. 1361-2).

Appellant contends that Metro sold away from Consolidated's competitor in Sapulpa for the 1932-33 season and in Hominy for the 1936-37 season. The Pettit theatre in Hominy had not licensed Metro's pictures during the period when it had no competition. When McClain opened the Ritz, Metro licensed its 1934-35 product and later its 1935-36 product to him. At that time Consolidated had no interest in any theatre in Hominy. When Consolidated acquired the

Ritz, Metro continued to license its product to Consolidated for use in the Ritz (R. 508-510).

Prior to the season 1932, Metro had licensed its pictures to Moulder for use in the Empress Theatre in Sapulpa. There is no direct testimony as to why Metro ceased to do business with Moulder after the season 1931-32, but the evidence does show that Moulder was in financial difficulties at that time and closed one of his theatres (R. 629, 637). Moulder's financial condition was, of itself, sufficient to warrant Metro in considering that he was no longer a satisfactory customer. Beginning with the 1932-33 season, Metro has licensed its pictures to Consolidated. Moulder has had all the major product he needed or could use (R. 638, 645). He has at all times had first run pictures of Fox, Paramount, Columbia and United Artists—four of the eight major distributors, which the plaintiff contends were parties to the alleged conspiracy. In Sapulpa, Paramount chose to license to Griffith's competitor as it did in Gallup. Metro preferred to license to Nagle in Gallup, Mahone in Hobart, but preferred Consolidated in Sapulpa. The Metro product was not licensed to Westex in either Stamford, Ballinger or Odessa (Pltf's. Ex. L-5, R. 2258, L-6, R. 2270, L-7, R. 2280).

Appellant further contends that Columbia, Fox, Metro, Paramount, United Artists, Universal and Warners sold its second run product away from its regular customer in Norman for the 1938-39 season. There is no evidence that Mrs. Berry, Amusement's competitor, was at any time the established second run customer of either of those distributors, or that she was the customer of either of those distributors for

its best second run pictures for the season 1937-38. The only contract for second run product for that season, which was introduced in evidence, was a contract with Metro, dated November 26, 1937, for pictures of the fourth, fifth and sixth groups (Pltf's. Ex. 288, R. 2072, Ev. R. 696). Mrs. Berry testified that during the year 1937 she was able to secure some second run major product that Amusement was playing first run (R. 662), but she nowhere testified that she had product of any major distributor for second run pictures on a season's contract, and no contract with any major distributor for the best pictures was produced by her.

Appellant's contention is that, after that season, Berry was unable to license second run pictures on a season's contract, whereas she had been able to do so for the 1937-38 season. There was no evidence that she was not able to license second run pictures on less than a full season's product. She had a part of United Artists' pictures first run and some second run (R. 663). She believed that she had some Universal pictures for the 1937-38 season (R. 673). Defendants' Exhibits 12 to 60, inclusive (R. O. R. 5263-5313, Ev. R. 685-6), were the United Artists' contracts which Mrs. Berry produced, but only two of those contracts were made in the 1937-38 season, and both were first run. The evidence conclusively shows that Mrs. Berry was not the choice of either of those distributors for its second run product for the 1937-38 season and, consequently, there was no sell-away in the 1938-39 season. For that season Paramount licensed thirty of its features second run to Amusement on September 24, 1937 (Pltf's. Ex. P-4, R. 2329-30);

Fox licensed thirty of its pictures second run to Amusement (Pltf's. Ex. F-7, R. 2221); Columbia licensed its pictures second run to Amusement (Pltf's. Ex. C-6, R. 2158); Warner licensed thirty of its pictures second run to Amusement (Pltf's. Ex. W-8, R. 2546); Metro licensed thirty of its pictures second run to Amusement (Pltf's. Ex. L-6, R. 2262); Universal licensed its pictures to Amusement second run (Pltf's. Ex. U-4, R. 2484). There is no evidence as to whom the pictures of RKO and United Artists were licensed second run for that season.

Appellant further contends that there was a sell-away by Fox and Metro in Shawnee for the season 1933-34. The Ritz was leased by Amusement from Jake Jones in 1926. The lease was made when the Ritz was operated as the "A" Theatre, but in 1930 it had become the "C" theatre. On account of the high rent, which was being paid for it and the business depression, the Ritz was closed in August of 1930. In December of 1930, Amusement again opened the Ritz and attempted to operate it as a second run house, but the operations were not successful and, on March 2, 1931, it was closed. The original term of the lease expired September 1, 1931, and in February or March of 1931, Amusement acquired the Victory Theatre, then closed, expecting to use that theatre for a second run house upon the expiration of the lease on the Ritz. The financial depression commenced to be felt in the summer of 1930 and the downward trend in the theatre business in Shawnee continued until 1933 (R. 1636). At the expiration of the lease on the Ritz, Jones took it over and commenced to operate it and has continuously operated it ever since.

On May 1, 1933, Amusement opened the Victory under the name of the Rex and operated it as a second run house until the Avon was built and opened March 1, 1936 (R. 1688). Amusement had certain product of Fox and Metro licensed for exhibition second run in the Ritz and, when Jones took over the Ritz in September of 1931, that product was released by Amusement and licensed to Jones (R. 315). For the 1932-33 season Metro and Fox did not offer Jones a season's contract for their product second run. There is no evidence of any effort, on the part of Jones, to obtain that product and no evidence as to the product which he did license for that season, except Paramount's, which he licensed first and second run. The record is silent as to whom the Fox and Metro product was licensed second run for the 1932-33 season. The Rex, formerly the Victory, was not opened by Amusement as a second run theatre until May 1, 1933 (R. 1638). So Jones' failure to obtain Fox and Metro product could not have been due to the fact that the product had been licensed for use in the Rex. The evidence fails to establish any sell-away by Fox or Metro in Shawnee.

Priority of run was not arbitrarily or wrongfully obtained by appellees in any situation. The eight major distributors in the aggregate did not produce enough top box office attractions to supply pictures for more than one-fifth of the playing time of even one theatre (R. 946-7) in towns, such as those here involved, where there were three changes of program each week. Any exhibitor operating a class "A" theatre desired to have the best pictures, which were available, if they

could be licensed on reasonable terms. It was the policy of each of the distributors to attempt to license all of its pictures in advance of production to one exhibitor in each town. Each of the appellees in the non-competitive, as well as competitive, situations, where the town would support more than one theatre, played the best pictures in the "A" theatre and the others in a "B" theatre. When those pictures were licensed to one exhibitor on first run, they could not be licensed to another exhibitor in the same town for the same run. In any competitive situation it was unavoidable that one exhibitor would be successful in obtaining that which both exhibitors desired. They could not both have the same thing. One exhibitor necessarily had to take something less satisfactory to him than that which he desired. Competition is a battle for something that only one can get. One competitor must necessarily lose. *Sinclair Refining Co.* v. *Federal Trade Commission, supra.*

Even though one exhibitor might not be able to successfully operate his theatre, because of inability to obtain the pictures which he desired but could not obtain because they were licensed to and needed by his competitor, that would not constitute a violation of the law. However, the evidence in this case shows that an exhibitor can successfully operate on independent product and the pictures of major distributors which were available to him. Mrs. Guthrie in Clinton (R. 1007), Miss Kyser in Ada (R. 930), Mrs. Berry at Norman (R. 653), Russ at Stillwater (R. 821), Guest at Duncan (R. 818), Mrs. Hunt at Elk City (R. 1063), Jones at Shawnee (R. 317), Bearden & Smith at Lubbock (R. 1062), Isley & Moran at Chick-

asha (R. 896), and Nagle at Gallup (R. 740), Mahone at Hobart (R. 974), Moulder at Sapulpa (R. 627), and Love at Seminole (R. 880) have continued for years to operate successfully in competition with the defendants. The number of pictures released annually by independent distributors, during the period involved, is not shown, but four of the independents released approximately 375 pictures (R. 784-5).

Appellant argues that the selection of the same exhibitor in a competitive situation by six or seven of the major distributors, year after year, is explicable only in terms of circuit buying power. It is much more reasonable to infer that the things which would normally cause one distributor to choose a certain exhibitor in a town, would likewise cause other distributors to be desirous of licensing their product to the same exhibitor. If one distributor chooses a particular exhibitor because that exhibitor is a more desirable exhibitor than a competing exhibitor, it is very likely that other distributors will make the same choice, unless there can be a difference of opinion between reasonable men as to which exhibitor is more desirable. An exhibitor has the inherent right to acquire the best pictures possible, and the distributor, likewise, has an inherent right to choose its own customers. The trial court saw and heard the exhibitors who were operating in competition with appellees and had evidence from which it could determine whether or not a prudent distributor would choose one of the appellees as a customer in preference to the independent operator. After hearing the evidence, the Court found that, "The defendants, or

any of them, did not monopolize or attempt to monopolize the licensing or the supply of feature motion pictures for either first, second or subsequent run exhibition in any situation. The defendants licensed only such supply of pictures as they reasonably believed would be necessary in each situation to satisfy the demands of the public which they served." (Finding No. 23, R. 126). That finding is not assigned as error. It follows that there is no issue as to whether or not appellees licensed more pictures than were necessary or tied up product in order to keep it from their competitors.

The Court found that the defendants had not conspired nor combined with each other or with either of the major distributors to stifle competition or to monopolize, or attempt to monopolize, the exhibition of films (Finding 29, R. 127). Normally, there would exist no reason why any distributor would not be able to reach a satisfactory deal with a customer with whom it had been dealing for many years. During the period involved in this suit, there were failures of the defendant to reach an agreement with individual distributors and, on those occasions, the distributors did license their product to others. However, it was only natural that, when the next season came around, the distributor would again endeavor to license its product to its first choice of customer instead of offering it to a second choice of customer. There is not a single situation which has been referred to by appellant, in which the licensing of product in a manner different from that in which it was licensed, would not have constituted an abnormal and unnatural method of distribution.

Appellant contends that only when one exhibitor plays the product of three or four majors and the other exhibitor uses the remaining four or five can the distributor earn maximum rentals. There is no evidence to support that assertion. Appellant's argument is that there are 104 preferred days of playing time during each season and, unless the major product is divided that each distributor will receive inadequate preferred playing time. There is no evidence that there were sufficient pictures of the distributors, from whom appellees obtained first run, to result in inadequate playing time for any distributor on its pictures which were worthy of preferred time. Likewise, there is no evidence that a distributor would receive more rentals or desire to have its pictures played in an inferior house or in one where the best pictures were not usually shown in order to obtain more preferred playing time. Each distributor desires to have its top pictures played by the best exhibitor in the town and at the theatre which has the reputation of being the outstanding motion picture house. Each distributor has only a very limited number of pictures which are worthy of preferred playing time. There are not sufficient pictures of the eight major distributors in the aggregate to supply the preferred playing time of one theatre. The evidence is that there were less than 40 pictures of major companies which were worthy of preferred playing time (R. 946-7).

There were introduced in evidence photographs of the exteriors and interiors of the theatres in each of the towns in which there was competition (Defts'. Ex. 110 to 168, Inc., O. R. 5442-5581, Ev. R. 1603-1625, 1726-1733, 1895-6). Complainant made no attempt to prove that the independ-

ent theatre in either of those towns compared favorably with the theatres of the appellee operating in that town, as to size or general character, or that there was any factors which would normally be considered by a distributor which would cause the selection of the independent over the defendant's theatre, excepting in Gallup, Hobart, Hominy and Sapulpa. In Gallup, Nagle expressed the opinion that his theatre was superior to either of the Griffith theatres. The Chief, operated by R. E. Griffith Theatres, Inc. was remodeled and was an "A" house. The Navajo, its other theatre, played only slough pictures and second runs (R. 745). Nagle had the product of two of the best majors during the entire period and the product of at least one, and usually two, other major distributors was always available to him. He always had the product of Metro and Paramount (R. 742), and RKO was available to him for the 1934-35 season and the 1938-39 season, and Universal was available to him for the 1935-36 season. He had the product of United Artists for one season, and there is no evidence that it was not available to him for the other seasons (R. 743, 751).

At Hobart the Kiowa, operated by Amusement, is a fine deluxe theatre with all new equipment, the finest in that part of the country. It is larger than the Oklahoman, operated by Mahone (R. 991, 1002-3, 1582). Mahone has each year licensed the product of Fox, Loew and Universal. For the 1938-39 season the RKO product was not licensed to Amusement in Hobart, and there is no evidence that Mahone licensed it, but it was available for him. Mahone did not want United Artists product (R. 998, 999).

In Hominy the Pettit, which was operated by Vincent, was a larger theatre than the Ritz, which was operated by Consolidated. However, the Ritz obtained the product of four of the majors when it was first opened in opposition to the Pettit by McClain, another independent exhibitor. Consolidated modernized the Ritz and it was a nice theatre. It was superior in every respect, except size, to the Pettit (Defts'. Ex. 149-A and B, 150-A and B, O. R. 5546, 5548). In 1938-39 the Pettit had the product of three major distributors and fifteen or twenty pictures of another (R. 503).

In Sapulpa the Yale, operated by Consolidated, had about 750 seats against 1200 seats in the Criterion, operated by Moulder. Both the Criterion and Yale were nicely equipped and suitable for the exhibition of choice first run pictures (R. 629). The Yale was completely remodeled and redecorated in 1936 or 1937 (R. 1620). Moulder, during the entire period, has had the product of four of the majors. He has at all times had Paramount, Fox, Columbia and United Artists (R. 638). He had all of the pictures that he needed (R. 645).

There is no evidence that out of the thirteen competitive towns, outside of Oklahoma City, in which Amusement operated, there was any opposition theatre equal to its theatres, except in Hobart; or that out of the twelve competitive towns, outside of Oklahoma City, in which Consolidated operated, there was any opposition theatre which was equal to its theatres, except in Hominy and Sapulpa; or in the six competitive towns in which R. E. Griffith The-

atres, Inc. operated, there was any opposition theatre which was equal to its theatres, except Gallup.

In choosing a customer, a distributor, in addition to the size and equipment of a theatre, takes into consideration its acquaintance with the exhibitor and the history of the distributor with that exhibitor; the character and integrity of the exhibitor; the financial ability of the exhibitor; the previous experience relative to satisfactory liquidation of accounts and business transactions; the ability of the exhibitors from the standpoint of showmanship, progressiveness and advertising; the ability of the exhibitor to develop revenue in his theatre; the standing of the particular theatre in the community; the policy on which the particular theatre operates and whether the exhibitor has been a regular customer in that particular town over a period of years. There is no evidence that any competitor was the equal of either of the defendants in those particulars.

Appellant further contends that the distributor granted priority of run to appellees in some towns where the opposition theatre was charging the same or a larger admission price than was being charged by Griffith. Admission prices, which were fixed in contracts between distributors and appellees' competitors, were in no instance fixed pursuant to any demand of appellees or by reason of any agreement between appellees and the distributors (R. 1327, 1534-5, 1545, 1912, 1871, 1830-1, 1762, 1765, 1768, 1770, 1775, 1779, 1782). No competitor was required to charge those admission prices pursuant to an agreement with any appellee as was the case in *Interstate Circuit v. United States*,

306 U. S. 208. There is no evidence in this case that there was any policy or practice, on the part of any distributor, to grant priority of run to the exhibitor charging the largest admission price. When minimum admission prices were inserted in the licensing contracts, they were the admission prices which were currently being charged by the exhibitor. The exhibitor fixed those prices, and the only requirement on the part of the distributors was that such price would not be less than 15 cents for adults (R. 1357, 1551, 1912). Appellees had nothing to do with that practice. There is no evidence that any appellee charged a lesser price for admission to any first run "A" house than was charged by a competing theatre on a subsequent run. Appellant asserts that in Lubbock the Texan charged a lesser admission price than the Tech, operated by Smith & Bearden, and that the Texan played ahead of the Tech. The admission prices to the theatres of Lindsey Theatres, Inc., which were in effect in 1939, were as follows: All theatres charged an admission of 10 cents for children; the Texas, Lyric and Cactus charged an adult admission of 20 cents; the Lindsey and Broadway charged 25 cents; and the Palace, which at that time was the "A" theatre, charged 35 cents for balcony and 40 cents lower floor (R. 1901-2). When the Federal tax came into effect, Lindsey Theatres, Inc. made some changes in admission, lowering some and raising others, but endeavoring to make prices which did not involve odd cents (R. 1651-1652). The Tech was first opened with an admission price of 20 cents for adults. About two years later the admission price was raised to 25 cents for adults (R. 485). That change was voluntarily made by Smith & Bearden and was evidently made when

the Federal tax of October 1, 1941, became effective, which fixed a 20 per cent tax on all admissions over 10 cents. There is no evidence that those prices, which exceeded the 15 cent minimum were not voluntarily made by those exhibitors. Shortly after the Tech was opened, Smith & Bearden began to give a special students' rate and it continued until the partnership was dissolved. They also had "pal days" which started about 1937 and continued until the dissolution of the partnership (R. 894). The admission price, which was charged by the Texan at the time Smith & Bearden opened their Tech theatre, was 20 cents (R. 486). No change was made in the admission price to the Texan after the Tech opened. As the admission prices to the Texan were determined before the Tech was opened, they had no relation to the prices which Smith & Bearden voluntarily fixed for their theatre. The admission to the Texan remained the same, except for Federal taxes, until the trial of the case (R. 1652).

Appellant asserts that in the town of Ada the Ritz and Kiva theatres of Griffith Amusement Company charged the same admission prices as the Strand operated by Miss Kyser. There was no evidence as to the admission prices which were generally being charged in the theatres operated by Miss Kyser. She said that she did not remember the price policies of the various theatres in Ada (R. 940, 941). The adult admissions charged by theatres of Amusement in the period between 1934 and 1939 were: McSwain —35 cents; Kiva—20 cents; and Ritz—15 cents through August and 20 cents for the balance of the year. (Defts' Ex. 133, O. R. 5511, Ev. R. 1647). Those theatres were acquir-

ed by Amusement on March 1, 1932, prior to the time that Miss Kyser owned any theatre in Ada. There is no evidence to indicate that Miss Kyser did not voluntarily fix the admission price policies for her theatres at the time they were opened, or that the admission prices, which were being charged by the three theatres of Amusement, did not remain the same as they were before Miss Kyser entered business in the town of Ada.

A comparison of the admission prices in Ada, a competitive town, against Chickasha, a non-competitive town, and Norman, a competitive town, with Okmulgee, Bartlesville and Vinita, non-competitive towns (Defts'. Ex. 133) clearly shows that the lower admission prices in competitive situations were matched by equally low admission prices in the non-competitive situations. In all situations defendants maintained prices which they thought would attract the customers and enable customers to get the most possible entertainment for their money. They endeavored to maintain theatres which operated on different policies in order to have a broader appeal and reach as many potential customers as possible. The evidence in regard to admission prices does not warrant an inference that the admission prices, which were charged by appellees' competitors, were fixed pursuant to any agreement between appellees and any distributor, or that appellees had anything to do with the admission prices which were charged by their competitors. The evidence does not warrant an inference that priority of run in any instance was granted to a defendant contrary to the normal and usual practice of the distributors in licensing pictures.

There is no evidence that the defendants combined in the licensing of pictures for the purpose of compelling any distributor to grant priority of run to them in any situation.

Licensing of pictures by distributors without having offered them to competing exhibitors. Prior to the decision in *U. S. v. Paramount*, 66 Fed. Supp. 324, the courts had repeatedly recognized that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of a seller or buyer was wholly his own concern. Such was recognized to be a part of a trader's civil rights. He was at liberty to refuse business relations with any person whomsoever and for any reason whatsoever. That was recognized as the law by this Court in *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, 320, and *U. S. v. Colgate and Co.*, 250 U. S. 300, 307. That was recognized to be the law in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (C. C. A.), 227 Fed. 46, 49, and *Greater New York Film Rental Co. v. Biograph Co.* (C. C. A. 2), 203 Fed. 39. See also *Westway Theatres, Inc. v. 20th Century-Fox Film Corporation* (C. C. A. 4), 30 Fed. Supp. 830, 836; *Brosious v. Pepsi-Cola Co.* (C. C. A. 3), 155 Fed. (2d) 99, 102. In *U. S. v. Bausch & Lomb Co.*, 321 U. S. 707, 708, this Court held that Congress in no instance has indicated an intention to interfere with ordinary commercial practices. "In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service." Likewise, in the motion picture exhibition field, the right to select customers may be the most

essential factor in the maintenance of the highest standards of service.

It would appear that the decision in *U. S.* v. *Paramount*, 66 Fed. Supp. 324, is in conflict with the above decisions to the extent that the Court held that licensing agreements made without an opportunity being given for exhibitors to bid for pictures at an offered price is illegal. In the case here it is an undisputed fact that some pictures were licensed to appellees without any offer having been first made to competing exhibitors and that others were licensed to defendants' competitors without any offer having first been made to the defendants. Also, it is an undisputed fact that licensing contracts with all exhibitors throughout the United States have for many years been made without pictures having been first offered to, or negotiations had with, competing exhibitors. If, for that reason, a licensing contract violates the Sherman Act, then every licensing contract which has been made during a period extending back to the early days of the motion picture industry has violated such act.

Extending back to the early days of the industry, it has been the well established practice of motion picture distributors to select the exhibitor to whom it desired to license its pictures—generally an exhibitor with whom it had for years satisfactorily done business—and to attempt to negotiate a contract with that exhibitor before negotiating with, or offering its pictures to, anyone else. If a satisfactory deal could be made with that exhibitor, the distributor would not offer its product on that run to a competing exhibitor. If unable to make a satisfactory deal with the exhibitor of its choice, it would

attempt to license its product to the next best prospect. The terms on which the pictures were licensed were arrived at by negotiation between the distributor and the prospective customer. That was the normal and customary way of licensing pictures for all exhibitors regardless of the number of theatres involved (R. 1303-1308, 1533-1542, 1518-1520, 1541-1560, 1562-1905). The defendant corporations were selected as customers in a normal and customary way, and the negotiations leading up to the contracts were carried on between them and the several distributors in the usual and normal way.

In Paragraph XIX of the Consent Decree in the *Paramount* case it was expressly provided that, "Except as otherwise expressly and specifically provided in this decree, nothing herein shall be construed to limit the right of any distributor defendant to select its own customers, to bargain with them in accordance with law, or to negotiate with or license to, or accept any offer from, any exhibitor to license its motion pictures, or any number thereof, upon such terms and conditions as it deemed advisable or to its best interest." Thus, it appears that at the time the Consent Decree was entered, it was not considered unlawful for a distributor to select its customer and license pictures to him without first having negotiated with the competing exhibitor. If, notwithstanding the terms of the original decree, the later decree in the *Paramount* case should be affirmed, we submit that appellant is not entitled to any relief in the instant case on the ground now under consideration. No such contention was presented in the Complaint in this case (Complaint, Pars. 41, 42 and 43, R. 6 and 7, as amended by Bill of Particulars, 18(c)

and 19, R. 39). The alleged combination of appellees, which was an essential part of the charge against them, had nothing whatever to do with the fact that the pictures were licensed to them before the distributors had negotiated with competing exhibitors. That was the trade practice of the distributors and applied to all exhibitors. There was no departure from the normal and usual practice in licensing pictures and, consequently, there were no grounds for inferring that appellees combined to coerce and compel the distributors to adopt that method of negotiating for the licensing of pictures to them.

Whatever Buying Power Appellees Possessed Was Rightfully Acquired.

We have seen that, at the time this suit was filed, there was no connection between Amusement and Consolidated, on the one hand, and R. E. Griffith Theatres, Inc. and Westex, on the other hand, in the licensing of pictures. Amusement and Consolidated were interested in theatres in forty-three towns and R. E. Griffith Theatres, Inc. and Westex were interested in forty towns (Findings 2, 3 and 4, R. 84, 85). Appellant failed to establish that theatres were either acquired by predatory methods or wrongful acts. It failed to establish that theatres were combined in the licensing of pictures for the purpose or with the effect of crushing competition.

Acquisition of theatres. The trial court made a finding that the theatres and interests in theatres acquired by the several defendants were acquired in the course of ordinary, normal and legitimate growth and development of

the business, and that none of the theatres or interests were acquired by wrongful means, predatory practices, or with the intent to stifle competition or to monopolize the licensing or exhibition of moving picture films (Finding 14, R. 123). The Court also made a finding that the defendants did not acquire any competing theatre by virtue of any combination, conspiracy or agreement upon the part of the defendants to control or stifle competition, or to monopolize the exhibition of moving picture films in those situations, and that no acquisition was made as the result of coercion, threats or predatory practices (Finding 15, R. 123). Those findings were made after the Court had heard the oral testimony of witnesses.

In addition to those findings the Court made some findings relative to certain towns (Findings 11-1 to 11-25, R. 89-122). Some of those findings contained statements of conflicting testimony relating to alleged predatory practices of a defendant. Appellant asserts that the Court made no finding as to where the truth lay. In every instance, in which the Court in a particular finding failed to make a finding of the ultimate fact that the alleged predatory acts or wrongful conduct had not been established, such finding of ultimate fact was made in Findings 14 and 15 (R. 123).

Appellant has presented only nine instances in which the testimony established that the defendants acquired a theatre from a competing independent exhibitor. There is no evidence that the defendants combined to make any acquisition. There is no evidence that the method in which pictures were licensed by appellees was in any way responsible for the acquisition of those theatres.

Amusement operated in three of those situations, to-wit, Blackwell, Norman and Phillips Camp; Consolidated operated theatres in four of those situations, to-wit, Altus, Lubbock, Hominy and Mangum; Westex operated theatres in two of those situations, to-wit, Plainview and Brady.

The finding that there were no predatory acts or wrongful conduct in the acquisition from Hamm of his Ritz theatre in Altus is supported by the evidence (R. 1595, 1596, 1748-1750). The undisputed evidence further was that the lease on Consolidated's Paramount theatre in Altus had expired in the fall of 1936, and the Ritz was purchased to replace the Paramount as its "C" house. It has been continuously operated (R. 1595, 1748, 1751).

Appellant's statement that Consolidated's master contracts with Fox, Loew, Paramount and Warner gave it the option to play second run pictures in Altus is erroneous. Consolidated had no second run privilege under any of its contracts for the town of Altus.

The finding that there were no predatory acts or wrongful conduct in the acquisition from Laham of his Bays theatre in Blackwell is supported by the evidence (R. 441-474). The Bays was acquired by Amusement subsequent to the period involved in this suit. Although the Bays had more seats than either of the theatres of Amusement, the latter theatres were adequately seated, in view of the number of theatres which were operating in Blackwell. There is no evidence that the seating capacity of either of those theatres was inadequate to accommodate all of those who desired to view the pictures which were there exhibited.

The Bays was an old theatre and, in its appointments, was not the equal of either of Amusement's theatres. Amusement acquired it with the intention of operating it as a theatre and did operate it briefly. It was closed because the city authorities declared the building to be in an unsafe condition (R. 441-463, 1578, 1579, 1580). At the time Laham sold the Bays, it had unplayed product of RKO to the extent of thirteen first run and twenty-nine second run, three shorts and forty-seven news reels, which were unplayed on the contract which it made a year before (R. 470). The Bays was able to obtain and played five pictures each week during the year previous to the sale (R. 465). For the 1938-39 season, in addition to the RKO product first and second run, it also had the second run product of Metro for the 1937-38 and 1938-39 seasons, first run product of Republic, Grand National and Gaumont British and some second run of Universal (R. 443). The fact that Metro licensed its season's product for the 1938-39 season to the Bays refutes appellant's contention that Amusement's first run contracts prevented the licensing of second run product.

The finding that there were no predatory acts or wrongful conduct in the acquisition from Duffy of his two theatres in Mangum is supported by the evidence (R. 701-702, 706-11, 1258-1271, 1826-1827; Defts'. Exs. 63, 64, 65, R. 2694, 2695, Ev. R. 717). Before Consolidated went into Mangum, it was apparent that Duffy could not survive. He had not obtained the renewal of the lease on the premises on which he was operating his principal theatre (R. 718). He was operating the other theatre on weekends and without any lease (R. 709, 716). He was unable to take pictures out of

the express office and was writing the distributors that he was broke. He wrote Metro that, "Competition is not breaking me; everyone in Mangum is broke" (Defts'. Ex. 66, R. 2697). Duffy admitted that he had all the major product he needed or wanted (R. 704-705).

The finding that there were no predatory acts or wrongful conduct in Amusement's operations in Phillips, or in connection with the abandonment of Smith & Bearden's Phillip theatre, is supported by the evidence (R. 725, 726, 729-732, 738, 739). The entire transaction relative to Phillips, Texas, occurred after the period involved in this suit. Amusement did not purchase the Phillip theatre. While Smith and Bearden were operating the Phillip, it was twice damaged by fire. After the second fire it was abandoned and the lease was surrendered and the equipment was taken out and moved to another town. Later, when the expansion of a refinery required the abandonment of Amusement's theatre, it built and equipped a new theatre on the location formerly occupied by the Phillip theatre (R. 731-738). There was no provision in the contract of Amusement with any distributor which granted clearance to Amusement's theatres in Borger over Smith & Bearden's theatre in Phillips or over any other theatre. Each distributor was free to make its own decision as to what availability would be given to the theatre of Smith & Bearden. Plaintiff's witnesses made no contention that they were unable to obtain ample product. Their complaint was that several of the distributors refused to make pictures available to their theatre in Phillips until after the pictures had been played in Borger. If that condition had been the result of an agree-

ment between Amusement and those distributors, the reasonableness of clearance would be involved. However, there was no clearance granted to Amusement's theatres in Borger over the theatre in Phillips. There was no evidence that clearance was requested by appellees of any distributor.

The finding that there were no predatory acts or wrongful conduct in Consolidated's acquisition from Vincent of his Pettit theatre in Hominy is supported by ample evidence (R. 498, 512). During the entire time that the Pettit was in competition with Consolidated, the Pettit was the preferred customer of RKO and Columbia, and their product was licensed to Vincent to the exclusion of Consolidated (R. 508, 509). The Ritz was being operated in opposition to the Pettit when Consolidated acquired it, and McClain, the owner of the Ritz, was already the customer of Paramount, Metro, Warner, Fox and Columbia. After Consolidated acquired the Ritz, Columbia thereafter licensed its product to the Pettit in preference to Consolidated (R. 508, 509). Although the Pettit was a larger theatre than the Ritz, it was not superior to it (R. 503, 504). Because of the death of his wife, Vincent sold the Pettit because he wanted to leave Hominy (R. 511, 512, 513). Consolidated leased the Pettit and remodeled and modernized it and thereupon gave up its lease on the Ritz (R. 1731). Vincent testified that the town of Hominy was not sufficiently large to support two theatres; that the Pettit was built during the boom conditions in the Osage Nation and that after the boom subsided it was overseated (R. 512, 513).

The finding that there were no predatory or wrongful acts by the defendants in its operations in Lubbock is

supported by ample evidence (R. 1136-1150, 1189-1198). Lindsey Theatres, Inc. owned and operated theatres in Lubbock. Consolidated owned half of the stock of that corporation. Lindsey acquired two theatres from Mauldin and one from Sanders. There was no evidence of any threats or predatory practices in connection with those acquisitions. They were acquired in the course of legitimate expansion, as the town's population increased, and they have been continuously operated by Lindsey Theatres, Inc. There was no evidence that either of the former owners were unable to obtain adequate major product. The evidence which was offered by the plaintiff related to the construction of a theatre by Lindsey on College Avenue and alleged threats on the part of representatives of Lindsey Theatres prior to the construction of that theatre, and to the demand of the owners of the Tech theatre for the privilege of exhibiting pictures in the Tech ahead of the Tower. The Court heard the testimony of these witnesses relative to the alleged threats and found that the plaintiff had not established that the defendants had engaged in threats or predatory acts. The finding is supported by the evidence (R. 1139-1142, 1195-1198). Prior to the opening of the Tower theatre, the Tech theatre had been licensed pictures for exhibition on a specified run in the town of Lubbock. After the Tower was opened, they made a joint demand on the distributors that they be permitted to play pictures first run on College Avenue (R. 521). Two of the distributors acceded to the demand but each of the others continued to license its pictures in the customary manner. The Tower was by far the second best theatre in Lubbock, and several of the distributors licensed

pictures for second run exhibition in Lubbock in that theatre (R. 1148, 1372) in lieu of a downtown theatre of Lindsey which had been playing second run in Lubbock. The Tech continued to receive the same run in Lubbock that it had received prior to the building of the Tower (R. 489). The owner of the Tech admitted that in order for any distributor to accede to his demand for the licensing of product to the Tech theatre for first run on College Avenue would have constituted a departure from the ordinary method of licensing pictures (R. 524). The evidence discloses that there were three exhibitors operating in Lubbock in competition with Lindsey Theatres, Inc. Each of them was able to license subsequent run pictures. That evidence completely refutes appellant's contention that the master contracts of appellees prevented the licensing of subsequent run to competing exhibitors. It is not a fact that the Tower was permitted to play second run 100 to 120 days ahead of the Tech (R. 494). There was no clearance provision between any distributor and appellees for clearance in favor of any of Lindsey's theatres in Lubbock. Each distributor was free to negotiate with the Tech in regard to the availability of pictures for that theatre without being limited or restricted by any contractual agreement with appellees.

The finding that there were no predatory acts or wrongful conduct in Westex's acquisition from Tower Theatres, Inc. of its Fair theatre in Plainview is supported by ample evidence (R. 241-275). Scaling and associates opened the Fair theatre on January 11, 1936, and operated it until October 15, 1936, when it was sold to Westex. The real

issue in connection with Scaling's operation in Plainvew was his inability to license second run pictures. Westex licensed no second run pictures in that town. That subject has hereinbefore been covered. We have seen that the several distributors did license second and subsequent run to competitors of appellees in other towns and were free to license them in Plainview if they had so desired. Appellees had nothing to do with the failure or refusal of any distributor to license pictures for second run in the Fair theatre. There is no evidence that Scaling sold his theatre because of a lack of product. He operated his theatre on a policy of four changes per week until the theatre was sold (R. 274).

The finding that there were no predatory acts or wrongful conduct in the acquisition by Brady Amusement Company from Morgan of its Ritz theatre is supported by ample evidence (R. 1028-1032, 1041-1042). Morgan acquired an interest in the Ritz theatre in Brady in December of 1935 and operated it until November of 1936. There is no evidence that he was at any time an acceptable or established customer of any distributor. Although pictures of Columbia were licensed to the Ritz when Morgan acquired it, he played only a few of the pictures. In the six towns in which he had operated briefly before coming to Brady, he had left unplayed pictures. United Artists solicited him to purchase pictures for the 1935-36 season, but they were unable to agree on terms and made no contract. Appellant claims that he was deprived of the Universal product for the 1936-37 season. He had never been a customer of Universal in that town, and the history of his theatre opera-

tions was sufficient to warrant Universal in preferring not to license pictures for exhibition in the Ritz theatre, while Morgan was operatng it.

In Norman Amusement did not acquire any theatre from a competitor. The finding that there were no predatory acts or wrongful conduct in the acquisition by Amusement of a lease on a building in which Mrs. Berry had operated her Campus theatre is supported by ample evidence. Mrs. Berry was unable to renew the lease on the Campus theatre, but Amusement had nothing to do with her inability to renew that lease. The undisputed evidence is that the failure was the result of a controversy between the landlord and Mrs. Berry (R. 1469-1477). Thereafter, Amusement leased the property for the purpose of operating a theatre adjoining the University Campus. Amusement's lease provided that it should have possession about August 1, 1938, but did not obtain possession until October 5th (R. 1610). Amusement contemplated that it would not be necessary to remodel the building, and that it could be opened shortly after possession was acquired, but when possession was obtained it was found that the former tenant had torn up and damaged the building to such an extent that it would require a major job of repair and remodeling. The wiring had been entirely torn out, the lobby frames on the front of the building had been stripped off, and the walls had been stripped. The penthouse on the building had been torn off, leaving a large hole in the roof, so that a cooling system could not be installed without building a complete new roof and penthouse. When Amusement discovered the condition of the building and the extent of the repairs neces-

sary, it decided that it would be better to acquire another location near the Campus, with a front of 50 feet instead of 25 feet. Negotiations were carried on, but a suitable location could not be obtained. Amusement then decided to delay making the large expenditures necessary to open the Campus until it could observe the operation of a similar theatre on a lot 25 feet wide, adjoining the Campus at Stillwater. When the operation proved satisfactory, it remodeled and equipped a theatre on the former Campus theatre location and opened it as the Boomer theatre (R. 1610-1612).

There was no evidence that in 1937 Griffith remodeled a closed theatre and reopened it as the Varsity. The Court did not so find (R. 111). The undisputed evidence is that Amusement's lease on the theatre referred to expired in 1930 and was not renewed. Amusement had no connection with that theatre from the time its lease expired until July, 1947. When Amusement purchased the real estate at a foreclosure sale and remodeled, re-equipped and opened it as the Varsity at that time, it was not equipped for or operated as a theatre (R. 1606, 1607, 1719). Appellant's contentions relative to the distribution of product in Norman has heretofore been answered.

The number of competitors who discontinued operations in the territory, in which the several defendants operated, were surprisingly small without regard to business and economic conditions. In view of the fact that the period involved in this suit was one in which the entire country experienced the greatest depression in its history, it is indeed surprising that the number who discontinued operations was so small. The evidence fails to disclose any plan on the part of the

corporate defendants, either separately or collectively, to crush competition or attempt to monopolize.

Vendor's agreements not to compete. The trial court made a finding that agreements not to compete were taken in connection with the purchase of theatres by the several defendants and based upon the sale of the good will of the vendor, and were for lawful purposes, and were in conformity with the state statutes in such situations, and were not entered into with the purpose or with the effect of unreasonably restraining trade or commerce (Finding No. 16, R. 124). No adequate assignment has been made relating to the vendor's agreements not to compete. The undisputed evidence was that each of those contracts covered the sale of a going theatre business, and that the sale carried with it the good will of the vendor. Such covenants have been recognized as reasonable and valid restraints of trade and not in violation of any law. *U. S.* v. *Missouri Freight Association*, 166 U. S. 290; *U. S.* v. *Addyston Pipe & Steel Co.* (C. C. A. 6), 85 Fed. 271, 280; *Goldberg* v. *Tri-States Theatre Corporation* (C. C. A. 8), 126 Fed. (2d) 26.

Such agreements were taken whenever a defendant purchased a going theatre business and were not limited to instances in which a theatre business was purchased from a competitor. The agreements were in conformity with applicable state law. Such contracts are not recognized as evidencing a wrongful intent or purpose because they restrict competition. On the contrary, both State and Federal law recognizes such contracts, when taken in connection with the sale of a going business, as a reasonable restraint of trade.

Plaintiff's Exhibit 273, which has been listed by appellants, is not included in the original or typewritten record. The vendor's agreement made at the time of the sale of the theatre in Brady to the Brady Amusement Company (Pltf's. Ex. 133) is the only agreement, in which a contract not to compete within a specified time, extended beyond the immediately competitive area. There was no contract of that kind made by Amusement or Consolidated. The vendor's agreement, which was made in connection with the purchase of the theatre in Plainview by Westex and associates, was in conformity with the laws of the State of Texas, although it did not state a time limit. In the absence of a specified period, the agreement has been held to be binding for only a reasonable period. *Malakoff Gin Co.* v. *Riddlesperger* (Texas), 192 S. W. 530; *Langever* v. *United Advertising Corporation* (Tex. Civ.), 258 S. W. 856; *Randolph* v. *Graham* (Tex. Civ.), 254 S. W. 402.

Theatres in which the several defendant corporations own less than 100% interest. Defendants' Exhibits 169 and 170 (O. R. 5583-84, Ev. R. 1899), and Plaintiff's Exhibit 381 (R. 1103) reflect the interest owned by the several defendants in the various towns in which theatres were operated. Amusement owned theatres in partnership with other parties in twelve towns. In those towns one or more individuals jointly owned the theatres with Amusement. At the time the theatres were jointly acquired, said parties had not been operating competing theatres in the town where the acquisition was made or at any other place. Competition was not eliminated by reason of the partnership arrangement. The partnership in the town of Ada is illus-

trative of how those partnerships were formed. Amusement owned 60% interest and Mr. and Mrs. Killough owned 40%. Those interests were acquired May 6, 1929 (R. 416). Mr. and Mrs. Killough had formerly been partners with Griffith Brothers in Honey Grove, Texas. The Honey Grove theatre was traded for a theatre in Hugo which was operated by the Killoughs with Griffith Brothers until they, in company with Amusement, bought theatres in Ada. The Killoughs have been partners with either Griffith Brothers or Amusement in the operation of theatres since about 1917 (R. 1843-4).

In Stillwater Amusement owns 66⅔% and Leachman Brothers 33⅓% (R. 417). That partnership was made in 1926 immediately after Claude Leachman had completed his schooling at the college in Stillwater. He decided to enter the motion picture business and succeeded in interesting the two Griffith brothers in making an investment with him (R. 1206, 1207). In each of those towns the partners entered the town as partners and have remained partners ever since.

In Guthrie, Amusement and Powell each owned a 50% interest in certain theatres. Powell acquired a theatre in Guthrie in 1923 and in 1925 he sold a one-half interest to Griffith Brothers. When Amusement was organized, Powell continued to own one-half interest, and Amusement acquired the one-half interest which had been owned by Griffith Brothers. The sale was initiated by Powell and was not due to any threats of predatory competition or otherwise.

Consolidated had partners in 25 towns, including Lubbock, Texas, in which the theatres were owned by Lindsey Theatres, Inc., the stock being equally owned by Consolidated and Lindseys. Also included are eight theatres in the towns of Cuero, New Braunfels, Refugio and Uvalde owned by Jack Pickens Theatres, Inc., in which Consolidated owned 50% of the stock. Also included were nine theatres in the towns of Alvin, Bay City, El Campo, Texas City, Victoria and Wharton, in which Consolidated owned a 25% interest. There is no evidence that the persons or corporations, interested with Consolidated in those towns, were ever in competition with Consolidated or either of the other corporate defendants in those towns, or elsewhere.

There is no evidence that the persons or corporations, with whom R. E. Griffith Theatres, Inc. or Westex owned interests in theatres, were ever in competition in any place.

There is no evidence that, in any situation, any partnership was arranged because of any threat of either of the corporate defendants to enter into competition with the person with whom it became a partner, or for the purpose of eliminating competition or other wrongful purpose. That type of operation was commenced by L. C. and R. E. Griffith when they first started in the motion picture theatre business in 1917, at a time when they were both traveling men and purchased interests in theatres with others who operated the theatres (R. 1843). Prior to the time either of the corporate defendants was organized, L. C. and R. E. Griffith had ascertained the advantages incident to a partnership arrangement under which one of the partners could operate the theatre and become an in-

tegral part of the community, while R. E. Griffith attended to the licensing and booking of pictures. Those partnerships were legally formed and were so continued. There was no violation of the Sherman Act or any other law in either the formation or continuation of those partnerships. Likewise, there was nothing illegal in the agreements between either of the corporations and its partners, which provided that the corporation would license and book pictures and perform other services for which it would be compensated in a designated amount, while the other partner would carry on the local management of the theatre and would be paid a designated amount for that service.

Joint operating agreements in Stillwater and Enid. Appellant has referred to these agreements as "pooling agreements." The word "pooling" has been used to designate many different arrangements, and such arrangement may or may not be illegal depending on the facts. In Stillwater the agreement was one entered into between Amusement and a competing exhibitor for the joint operation of one theatre owned by each and a division of the expenses of operation and the net proceeds. That contract was entered into September 12, 1931, and was for a period of one year (Pltf's. Ex. 341, O. R. 4305, Ev. R. 822). It was made in the darkest days of the depression when it was imperative that every possible means should be used to economize and at the same time to transact all possible business. The contract was terminated and both exhibitors resumed the operation of its own theatres prior to the period involved in this suit. That competition has continued ever since (R. 821).

In early 1932 Paramount Pictures Corporation, through a subsidiary, Texas-Oklahoma Enterprises, Inc. was operating two theatres in Enid, Oklahoma. Amusement was also operating two theatres there. The evidence does not disclose what other exhibitors were then operating theatres in Enid. In January, 1932, Paramount was in bankruptcy, and W. C. Underwood and C. T. Ezell of Dallas, Texas, purchased all of the stock of Texas-Oklahoma Enterprises, Inc. Paramount had no connection with Texas-Oklahoma Enterprises, Inc. after said sale. After acquiring the stock of the corporation, Underwood, who had been a partner with L. C. and R. E. Griffith prior to 1928 in the Oklahoma Specialty Company, made a deal with L. C. Griffith whereby Amusement would operate the two theatres of Texas-Oklahoma Enterprises, Inc. in Enid. Underwood and Ezell had no time or inclination to go into the theatre business and acquired the theatres in Enid with the expectation of being able to arrange with Amusement to operate the theatres. The theatres were operated by Amusement under such arrangement until 1938 when Amusement purchased a half interest in the theatres of Underwood and associates and sold half of its theatres in Enid to Underwood and associates. Thereafter, Underwood and associates and Amusement operated, as partners, the theatres which they had theretofore severally owned. Plaintiff's Exhibit 30 (R. 2019) is not a pooling arrangement, but is a contract for the operation of the theatres which were jointly owned by the above parties.

In Finding No. 17 (R. 124), the Court specifically found that each of the contracts was entered into "for the purpose of economy and efficiency in opera-

tion caused by local conditions. Such contracts were not entered into with the intent or purpose of unreasonably restraining trade or commerce, stifling competition or monopolizing the industry, and they did not have such effect. All such contracts were reasonable and the result of ordinary business dealings."

There is no evidence whatever that either of those operating agreements was brought about because of the inability of the "independent exhibitor" to obtain adequate product, or because of any illegal discrimination or unreasonable restraint imposed by reason of "circuit buying power."

Although a partnership agreement entered into between competitors eliminates some competition as does also a joint operating agreement between competing exhibitors, such contracts are not *per se* illegal. Such agreements do not necessarily effect an unreasonable restraint of trade and, when entered into for the primary purpose of effecting economy and efficiency of operation, such agreements are not violative of the Sherman Act. *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 567; *Fechteler* v. *Palm Brothers Co.*, (C. C. A. 6), 133 Fed. 462, 471; *U. S.* v. *Du Pont de Nemours & Co.*, 188 Fed. 127, 150; *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 360.

Administration contracts. The administration contracts are of two general types. One is an agreement between one of the corporate defendants and a party with whom it jointly owned and operated a theatre or theatres in a certain town, setting forth the terms of the partnership operation, the duties to be performed by each party, the compensa-

tions to be received by each party for the services performed, the division of profits and other details of operating the business. The second type is an agreement between Amusement, on the one hand, and Consolidated and its partner, as the owners and operators of certain theatres whereby, for an agreed percentage of the gross box office receipts, Amusement agreed to perform certain services, including the licensing and booking of pictures. An example of such contract is Plaintiff's Exhibit 10 (R. 2007). R. E. Griffith Theatres, Inc. had similar contracts with Westex and persons with whom Westex owned theatres.

The trial court found that such agreements were entered into for legitimate purposes and were not entered into, upon the part of any of the defendants, with the intent or purpose of unreasonably restraining trade or commerce, stifling competition or monopolizing the exhibition of moving picture films, and that they did not have such effect; that such administrative contracts were not entered into or used by the defendants, or any of them, for the purpose of compelling or attempting to compel any distributor or distributors of motion picture films to license pictures to the defendants or to grant the defendants any such privileges or to unreasonably restrain, restrict or interfere with the licensing of moving picture films to any other exhibitor (Finding 18, R. 124). This finding is not assigned as error. It is amply supported by the evidence (R. 1865-6).

Amusement and R. E. Griffith Theatres, Inc. each owned 100% interest in theatres in a number of towns. It was natural that each would create and maintain an organi-

zation to perform certain administrative functions in the operation of their respective theatres, including bookkeeping, auditing, tax service, insurance service, repair services of all kinds, advertising service, shipment of films and accessories, the supervision of the operation of theatres and the licensing and booking of pictures. Amusement maintained such an organization at Oklahoma City, and R. E. Griffith Theatres, Inc. maintained a similar organization at Dallas (R. 1863-65, 1589, 1638-41). There was nothing illegal in those parties using a common agent in the licensing of pictures and in the performance of the numerous valuable services covered by those contracts. It has never been considered unlawful for persons and corporations to use a common purchasing or selling agent in order to avail themselves of all the normal economic advantages which flow from quantity buying or selling. The welfare of the public does not require that individual exhibitors shall refrain from cooperating in order to obtain the same economic advantages of quantity buying, which may be enjoyed by single corporation or individual, who entirely owns a large number of theatres. The authorities have recognized that the public welfare will be served by such cooperative buying or selling. *Midwest Theatre Company* v. *Co-Operative Theatres of Michigan,* 43 Fed. Supp. 216; *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 357, 377; *Prairie Farmers Publishing Company* v. *Indiana Farmers Guide Publishing Company* (C. C. A. 7), 88 Fed. (2d) 979; *Arkansas Brokerage Company* v. *Dunn & Powell, Inc.* (C. C. A. 8), 173 Fed. 899.

The ability to employ persons of skill, in performing duties which demand skill, is one of the normal and legal pur-

poses and functions of cooperative buying and selling. The above cases recognize that the economies resulting from the reduction in overhead, saving of time and expense to the various members of the group and a possible reduction in price, resulting from sales in large quantities, are all legitimate, proper and normal economic advantages, which are inherent in that method of dealing. Undoubtedly, pictures may be cooperatively licensed in a manner which does not violate any law. The Court is not required to infer a wrongful purpose on the part of appellees in the use of administration contracts and of a common licensing agent, when it is just as reasonable to infer that they were entered into and used for lawful and legitimate purposes. *Penn. R. Co.* v. *Chamberlain*, 288 U. S. 333, 339; *Schad* v. *20th Century-Fox Film Corporation* (C. C. A. 3), 136 Fed. (2d) 911, 996. The real question in this case, therefore, is whether or not there is evidence that the lawful advantages, inherent in cooperative licensing of pictures, has been pushed beyond the point of such lawful advantages. There is a complete absence of evidence of any such wrongful use. There is no evidence that appellees would not deal with the distributor unless their demands were met. The evidence is to the contrary. There is no evidence that the administration contracts were entered into for the purpose of eliminating competition between the parties to such contracts. There was no competition between the parties to the contracts at the time they were entered into, and the contracts were subject to termination on 30 days' notice. There is no evidence that these contracts were entered into for the purpose of unreasonably restraining trade or in any manner violating the Sherman Act.

Possession of unexerted power which has been lawfully acquired is not unlawful. We have heretofore seen that the evidence does not support appellant's contention that there were concessions or discriminations of any kind or character in favor of appellees. It is important that we now ascertain what significance, in law, is to be given to appellant's assertion of the existence in the appellees of "vast purchasing power" and "competitive advantages" resulting from aggregating a large group of theatres in licensing films. This brings us to a consideration of the question of the legality of quantity buying and of any competitive advantages which may accrue by reason of such buying. In that connection, let us assume that all of the theatres for which R. E. Griffith was licensing pictures prior to the season 1938-39 were acquired by lawful means and that they were all owned 100% by R. E. Griffith, and that he otherwise licensed pictures for those theatres in identically the same manner as he licensed them for the group of theatres for which he acted. The so-called "buying power" of R. E. Griffith would then be identical with that which was possessed by the aggregation of theatres for which he licensed pictures during that period. Under those circumstances would R. E. Griffith possess power to compel any major distributor to do anything and would the possession alone constitute a violation of Section 2 of the Sherman Act? The answer is found in *United States v. United States Steel Corporation*, 251 U. S. 417, 450, where it was said, "But we must adhere to the law and the law does not make mere size an offense or the existence of unexerted trusts to its prohibition of them and its power to repress

power an offense. It, we repeat, requires overt acts and or punish them." To the same effect are: *U. S.* v. *International Harvester Co.*, 274 U. S. 693, 708; *Federal Trade Commission* v. *Paramount Famous-Laskey Film Corporation* (C. C. A. 2), 57 Fed. (2d) 152, 157; *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 196; *National Biscuit Co.* v. *Federal Trade Commission* (C. C. A. 8), 299 Fed. 733, 736.

Under the above authorities, if R. E. Griffith did possess the power to compel the distributors to grant to him more favorable rental terms than could be obtained by an individual or corporation licensing pictures for a single theatre, the possession of such power would not constitute a violation of the Sherman Act. There being nothing illegal in the "buying power" possessed by one individual owning theatres in 43 towns, is the possession of the same amount of "buying power" resulting from the aggregation of theatres of several owners, illegal? Would the mere fact that the defendant corporations operated as separate corporations, instead of all being unified in one corporation, make the possession of the same character and quantity of power unlawful? The question is answered in the negative in *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 377, in which it was said, "Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various individual units into one ownership. Either may be prompted by business exigencies and the statute gives to neither a special privilege. The question in either

case is whether there is an unreasonable restraint of trade or an attempt to monopolize." The resort on the part of the appellees to the common expedient of using a common agent in the licensing of pictures in order to promote economy and efficiency in the operation of their business was not illegal. If that arrangement materially aided them in competition, it was not condemned by law. It was said in *Arkansas Brokerage Company* v. *Dunn & Powell* (C. C. A. 8), 173 Fed. 899, 901, "It is quite as important to approve all lawful, fair and reasonable expedients devised to promote individual success as it is to condemn vicious and unlawful practices which violate public right and the public wield." In *Midwest Theatres Company* v. *Cooperative Theatres of Michigan*, 43 Fed. Supp. 216, the Court considered the legality of the use of Cooperative Theatres of Michigan as a common purchasing agent in the licensing of motion pictures for more than 100 theatres. It held that the "buying power" of the combination was not, in itself, illegal, and that the fact that the propriety ownership of the theatres was in a number of individuals instead of one did not render illegal the possession of such power as was collectively possessed by those exhibitors who cooperated. The method of cooperatively licensing pictures or "circuit" operation is open to anyone who desires to adopt it and who has the resources and ability to operate it. The fact that such operation may give an economic advantage over rivals, who have not chosen to adopt a similar method, does not constitute a violation of the Sherman Act. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 582; *Prairie Farmers Publishing Co.* v. *Indiana Farmers Guide*

Publishing Co. (C. C. A. 7), 88 Fed. (2d) 979, 982, Cert. denied 301 U. S. 696; *Federal Trade Commission* v. *Paramount* (C. C. A. 2), 57 Fed. (2d) 152, 156. Among the economic advantages, which may legally be obtained by quantity buying, is that of obtaining, by reason of competent and efficient representation, more favorable terms than can be obtained by a buyer in less quantities, and the saving of expense and time by using a common agent. Those are recognized as legitimate advantages. Since the pooling of purchasing power does not violate the Act, appellant has failed to make a case, unless it has established by a preponderance of the evidence that appellees combined to compel and coerce the distributors to grant privileges which were in unreasonable restraint of trade. The collective licensing of pictures was not *per se* unlawful. The combination itself did not necessarily have the effect of unreasonably restraining trade. The trial court found that the purpose of appellees was to secure economy and efficiency and to obtain the lawful advantages which normally flow from such cooperative effort, and that the evidence did not sustain the charge that they combined or conspired to crush competition, to compel or coerce any distributor to unreasonably restrain trade in interstate commerce, or to monopolize the industry in the exhibition of moving picture films in the territory set forth in the Complaint (Finding No. 10, R. 87). The trial court further held "that the defendants, or any of them, did not compel or attempt to compel any distributor named in the Complaint to grant to them, or any of them, any privileges or concessions which were not granted to their competitors or which gave them any sub-

stantial advantage over their competitors" (Finding No. 19, R. 125). The Court made the further finding that, "The defendants, or any of them, did not conspire or combine with each other in the operation of theatres or with associates or with the distributors for the purpose or with the effect to unreasonably restrain or restrict the terms upon which feature pictures were to be or were distributed by such distributors or made available for exhibition in theatres competing with the defendants" (Finding No. 20, R. 125).

The mere possession of such "buying power" as the defendants collectively possessed was not as great as that possessed by a single independent exhibitor in some cities (R. 1381). The aggregate rentals paid by all of the defendants represented only a minor part of the annual revenue of each of the five largest distributors. A witness produced by plaintiff stated the percentage of the total annual film rentals of the Oklahoma City Exchange, which were paid by Amusement and Consolidated to Fox, Loew's, Paramount, and Warners for the five years involved in this suit. The average percentages were: Fox—33%; Loew's—28.13%; Paramount—32.25%; Warners—30%. The average percentage of RKO for the seasons 1935-36 to 1937-38, inclusive, was 30% (R. 1119, 1120). He further testified that the percentage of the totals of the annual rentals of the Dallas Exchange paid by the defendants was as follows: Fox—from 2 to 5%; Loew's—from 4.59 to 7.78%; Warner—from 3 to 7%; Paramount—from 2.32 to 2.92%. RKO was estimated at 2 to 8% (R. 1124, 1125). He further testified that the total

rentals in the Oklahoma City Exchange of Loew's during the highest year amounted to slightly more than 15/100 of 1% of that corporation's gross revenue; that the total rentals in the Oklahoma City Exchange of Paramount for the highest year was about 12/100 of 1% of the corporation's gross revenue; that the total rentals in the Oklahoma City Exchange of Warner Brothers in the highest year was about 14/100 of 1% of the corporation's gross revenue; that the total rentals in the Oklahoma City Exchange of Fox in the highest year was about 29/100 of 1% of the corporation's gross revenue; that the total rentals in the Oklahoma City Exchange of RKO in the highest year was about 1/10 of 1% of the corporation's gross revenue. It follows that such "collective buying power," as the defendants possessed, was not sufficient, in and of itself, to have the effect of compelling either of the distributors to do anything. Hence, the plaintiff is not entitled to prevail in this case without proving, by competent evidence, that the defendants combined for a wrongful purpose or wrongfully exerted such power.

The facts in this case establish that whatever buying power the defendant corporations had, either separately or collectively, was not acquired wrongfully; that it did not grow and develop by oppressive or coercive competition; that it was not wrongfully used or exerted; that it was not acquired for a wrongful purpose; that it was not used to obtain unfair or unreasonable advantages over competing theatres; that it did not attempt to obtain unfair advantages from any distributor; that it did not condition the licensing of moving picture films in any situation upon the licensing of such films in any other situation, or

in any non-competitive situation. There was no plan, purpose or effort to crush competition. Therefore appellant failed to prove the allegations of the complaint as amplified by the bill of particulars.

In *U. S. v. Crescent Amusement Company, supra*, the Court found (Finding 9-B) that the defendants did combine their closed towns with the competitive towns in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis. In the opinion of this Court, it was stated that, "The defendants would insist that a distributor give them monopoly rights in a town where they had competition, or else the exhibitor would not give the distributor any business in the closed towns where they had no competition." In *U. S. v. Schine*, 63 Fed. Supp. 229, the Court held that the defendants combined buying power to dictate terms to the distributors. In the case here the trial court found that "the defendants did not condition the licensing of moving picture films in any competitive situation upon the licensing of such films in any other situation, or in any non-competitive situation upon the licensing of such films in any competitive situations." (Finding No. 12, R. 123). That finding is supported by direct evidence (R. 1358-9, 1496, 1524, 1534, 1545, 1561, 1767, 1768, 1770, 1775, 1776, 1779, 1792, 1798, 1865, 1867, 1871, 1872, 1881, 1830, 1912; see also Findings 15, 19, 20, 26 and 29, R. 123-127). There is no direct evidence to the contrary and there is no other evidence which warrants a contrary inference or finding.

In the *Schine* case, the Court said that "motive is essential."

Appellant refers to the seasons when appellees did not make a circuit deal with Paramount, RKO and Universal, in support of its contention that the failure of a distributor to make a satisfactory deal with all of the defendants had the effect of depriving that distributor of film revenue from any of the defendants. We have hereinbefore referred to the circumstances under which circuit deals were not made in those instances. There was no demand by appellees that either of the distributors license its pictures to all of them or to any of them in any particular situation. The negotiations related only to those towns in which the distributor desired to negotiate contracts with appellees. There was no demand by appellees that pictures should be licensed to them in any situation as a condition to licensing pictures in any other situation. During the period here involved there was no circuit contract between any distributor and appellees under which priority of run was granted to appellees in all of the competitive situations. The failure of appellees to make a circuit deal with Paramount, RKO and Universal in those seasons was not due to any demand of the defendants for any exclusive privilege or because of any attempt by the defendants to compel the distributor to license its product in some town or towns where the distributor desired to license its product to another, or where a competing exhibitor was its established customer (R. 1771, 1772, 1781, 1787).

There Was No Error in the Exclusion of Testimony Offered By Appellant.

The testimony which appellant, in its brief, contends was wrongfully excluded falls into three groups and will be so presented in this brief.

Testimony of independent theatre operators as to conversations with the representatives of major film distributors. Those statements were made by representatives of distributors who were not parties to the litigation. They were statements which were made without sanction of oath and without the opportunity for cross-examination. They were clearly hearsay. Most of the testimony of that kind related to the statement by the representative as the reason why the particular distributor would not license certain product to an exhibitor. The Court suggested to plaintiff's attorney that a representative of the distributor be called as a witness to testify as to his reasons for not selling. Whereupon, the attorney for plaintiff stated, "I would not accept his answer as to what his reasons were" (R. 452). The hearsay rule forbids the mere use of extra-judicial reference as an assertion to evidence the fact asserted. Wigmore, 2d Ed., Sec. 1788.

Inter-Department communication of the distributors. Testimony of this character was offered in the trial court on the theory that the statements therein contained were declarations of a co-conspirator in the furtherance of the conspiracy. The testimony was not admissible on that theory. In order for such declarations to be admissible in evidence, there must be a compliance with certain well-defined rules of evidence.

This Court has recognized that there is a distinction between a conspiracy and a contract in restraint of trade. A conspiracy is a partnership in a wrongful purpose. *United States* v. *Kissel,* 218 U. S. 601, 608.

The statements of an alleged co-conspiracy cannot be received as evidence against a defendant until the existence of the conspiracy and the defendants' relation to it are proved by independent evidence. *Glasser* v. *United States,* 315 U. S. 60, 74; *Walz* v. *Fidelity-Phoenix Fire Insurance Company* (C. C. A. 6), 10 Fed. (2d) 22, 24; *Minner* v. *United States* (C. C. A. 10), 57 Fed. (2d) 506, 511; *Winchester and Partridge Manufacturing Company* v. *Creary,* 116 U. S. 161, 166.

Statements of alleged co-conspirators to third persons, made in the absence of the defendant, are admissible against him only if performed or uttered in furtherance of the objects of the conspiracy. The statement of the alleged co-conspirator must be made in furtherance of the particular conspiracy which has been established. Statements which were not made in furtherance of such conspiracy are not admissible. *Pinkerton* v. *United States,* 328 U. S. 640, 647; *Logan* v. *United States,* 114 U. S. 263, 308, 309; *Brown* v. *United States,* 150 U. S. 93, 98.

Statements of past events are inadmissible against anyone except the person who uttered them. *McMan Oil and Gas Company* v. *Hurley* (C. C. A. 5), 24 Fed. (2d) 776, 779; *United States* v. *Brig Burdett,* 34 U. S. 682, 689. Under the above authorities the inter-department communications between representatives of a distributor were properly excluded.

Appellant now asserts that such documents were admissible under Section 695, Title 28, U. S. C. A. No document was offered in evidence on that theory, and no exhibit which was excluded was admissible under that statute. The statute referred to is copied in Appendix C. The modified "Shop Book Rule" contained in that statute was enacted for the purpose of eliminating the necessity for identification of the records by the person who made the entry therein. *Palmer v. Hoffman*, 318 U. S. 109, 112. It was not intended in any manner to change the existing law relating to the character of documents which were admissible under the Shop Book Rule or as exceptions to the hearsay rule. The statute merely eliminated the necessity for establishing the authenticity of the class of documents which were theretofore admissible under the "Shop Book Rule" without establishing the authenticity of the documents, except to the extent of establishing that they were made in the regular course of the business. In *New York Life Insurance Company v. Taylor* (Court of Appeals, D. C.), 147 Fed. (2d) 297, it was said, "Such records must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observation." In the *Palmer* case (318 U. S. 109, 111), this Court said that typical of such records are "payrolls, accounts receivable, bills of lading and the like."

In the same case this Court said that the Federal Shop Book Statute is not one "which opens wide the door to avoidance of cross examination." The exhibits which were excluded in this case were of a character which should not be admitted until the person, who wrote the documents,

has been subjected to the safeguard of cross-examination. *New York Life Insurance Company* v. *Taylor, supra; Antorg Trading Corporation* v. *Higgins* (C. C. A. 2), 150 Fed. (2d) 536, 539; *Schmeller* v. *United States* (C. C. A. 6), 143 Fed. (2d) 544, 550; *Buckley* v. *Altheimer* (C. C. A. 7), 152 Fed. (2d) 502, 507. The documents under consideration here were also inadmissible because the plaintiff did not make the preliminary proof required by statute. It requires that the person, offering documents of the character which are admissible under the Act, shall first establish that, "It was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter." No preliminary proof was offered by the plaintiff, except the stipulation that the documents were taken from the files of the several distributors. That is not a sufficient compliance with the requirement of the statute. *Schmeller* v. *United States, supra,* page 550.

In order for a memorandum or record to be admissible under Section 695, it must be a record of a contemporaneous act or transaction and not a statement of a past event. Each of Plaintiff's Exhibits (L-54, L-109, L-110, L-114-A, U-39) were offered by the plaintiff for the purpose of establishing statements, therein contained, of past transactions, and those exhibits were, therefore, inadmissible. *La Alra Silver Mining Co.* v. *United States,* 175 U. S. 423, 498-99.

The testimony was not admissible for the purpose of impeaching witnesses. Appellant contends that Exhibits F-19-CC and DD (R. 2597, 2598), RKO-21-E (R. 2640), U-39-R (R. 2669), L-54, L-68, L-109, L-110, L-114-A, L-123

(R. 2626, 2627, 2629, 2630, 2634) were admissible for the purpose of impeaching witnesses who testified in the case, even if they were not admissible as substantive evidence. There are well-recognized rules relating to the impeachment of witnesses by prior statements of the witness. As such evidence is not admitted as substantive evidence, but only for impeachment purposes, the witness must have first testified to a matter which is sought to be contradicted by the impeaching testimony. In addition, a proper foundation must be laid and the attention of the witnesses must have been called to the prior statement, whether oral or in writing.

Plaintiff's Exhibit F-19-CC is not a statement of the witness, Kupper, and was not admissible to impeach him. Exhibits F-19-CC and F-19-DD were also not admissible because Kupper had not testified to anything which those documents contradicted (R. 1397).

Appellant asserts that Plaintiff's Exhibit U-39 (R. 2669) was admissible for the purpose of impeaching the testimony of McCarthy, sales manager of Universal. That letter contains no statement of the witness, McCarthy. It purports to be a letter from A. J. Leary to Oldsmith (R. 2669). That exhibit was inadmissible for the purpose of impeaching the testimony of McCarthy, for the further reason that it was not presented to him or inquiry made of him in regard to it (R. 1537-1558). Appellant has referred to McCarthy as "the sole witness called for that distributor." McCarthy was not called as a witness for Universal. Universal was not a party to this case at the time the witness testified.

The necessity for the presentation to the witness, who is sought to be impeached, as a preliminary requisite to its admission, is well-recognized. *The Charles Morgan,* 115 U. S. 69, 77; *C. M. S. & P. R. R. Co.* v. *Artery,* 137 U. S. 507.

Appellant asserts that Plaintiff's Exhibit RKO-21-E (R. 2640) was admissible to impeach the testimony of the witness, Depinet, sales manager of RKO. That exhibit does not purport to be a statement of the witness, Depinet. It was not admissible for the purpose of impeaching his testimony, because it was not presented to him, and he was not examined relating to it (R. 1515-1529). In the testimony of Depinet (R. 1526), is the following: "Q. I will show you this photostat of a letter that has been identified as RKO Exhibit 21, which is addressed to you and signed by an exhibitor named Mahone, and ask you if you recall having received that. A. Yes, that letter has a ring of familiarity about it. I imagine that I received it. In fact, I know that I received it, or my office did." The letter referred to is RKO-21-A (R. 2636) and not the document which appellant is now claiming should have been admitted to impeach the witness (RKO-21-E, R. 2640). There is no reference whatever to RKO-21-E in Depinet's examination. Plaintiff's Exhibits L-54, L-68, L-109, L-110, L-114-A, L-123 (R. 2626, 2627, 2629, 2630, 2634) were not admissible to impeach the testimony of Rogers, general sales manager of Loew. Neither of those exhibits purports to be a statement of the witness, Rogers. Neither of those exhibits was presented to Rogers during his examination. His attention was not directed to and he was not examined about any exhibit (R. 1559, 1563).

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

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APPENDIX

APPENDIX A

Paragraph Fourth of Printed Contract Form of Twentieth-Century Fox (Pltf's. Ex. F-2, R. 2205, Ev. R. 363, 1422).

"Delivery and Return of Prints—Fourth: (a) After each of said motion pictures is generally released for public exhibition and becomes available for exhibition hereunder by the Exhibitor, the Distributor agrees to deliver as hereinafter provided, a print thereof to the Exhibitor.

"(b) The public exhibition of any of said motion pictures for three (3) consecutive days at prices usually charged for admission to the theatre where so exhibited in the territory wherein is located the exchange from which the exhibitor is served, excepting any 'road show,' 'tryout,' 'preview,' or 'pre-release' exhibitions thereof, shall be deemed the general release for public exhibition of such motion picture but only in such territory. A 'pre-release' exhibition shall be deemed any exhibition because of seasonal conditions making desirable exhibitions in advance of general release as herein defined.

"(c) The Exhibitor agrees to exhibit each of said motion pictures in the order of its general release by the Distributor in the exchange territory in which said theatre is located. The Exhibitor shall have the right to select any of the motion pictures, excepting the last deliverable hereunder, for exhibition out of the order of its general release, subject to prior runs and/or clearance granted other exhibitors, on the date or dates determined as provided in Article Sixth hereof or

otherwise agreed upon, but only upon the following conditions (a) that the Exhibitor is not in default hereunder and shall have fully complied with all the provisions, if any, set forth in the schedule for the exhibition of one or more of said motion pictures at specified intervals; and (b) that the Distributor and the Exhibitor shall then agree upon the date or dates upon which all of the motion pictures generally released prior to the general release of such motion picture and available for exhibition hereunder shall be exhibited by the Exhibitor, which date or dates shall be within thirty (30) days from the first exhibition date of the motion picture to be exhibited out of the order of its general release; or in the alternative the Exhibitor shall then pay to the Distributor the license fee for each of such motion pictures then generally released and available for exhibition hereunder, and as to any thereof which shall not be exhibited by the Exhibitor within thirty days from the first exhibition date of the motion picture to be exhibited out of the order of its general release, the grant of the run and clearance period in respect thereof shall be deemed waived by the Exhibitor. Upon the failure or refusal of the Exhibitor to exhibit any of such motion pictures then generally released and available for exhibition hereunder within said thirty day period or to pay the license fee thereof, the right of the Exhibitor to thereafter select for exhibition any motion picture out of the order of its general release shall be forfeited. The provisions of this paragraph (c) shall not be deemed to limit or qualify the provisions of Article Sixth hereof excepting as in this paragraph (c) specifically provided."

APPENDIX B

Paragraph Sixth of Fox's Printed Contract Form (Pltf's. Ex. F-2, R. 2205).

"SELECTION OF PLAY DATES—SIXTH: Unless otherwise agreed upon or unless definitely specified or otherwise provided for in the Schedule, the exhibition date or dates of each of said motion pictures shall be determined as follows:

"1. Subject to prior runs and/or clearance granted or hereafter granted by the Distributor to other exhibitors and within a reasonable time after a print or prints of any of said motion pictures are received at the exchange of the Distributor out of which the exhibitor is served, and provided the Exhibitor is not in default hereunder, the Distributor shall mail to the Exhibitor a notice in writing of the date when each such motion picture will be available for exhibition by the Exhibitor (which date is hereinafter referred to as the 'available date'). Such notice shall be mailed to the Exhibitor at least fifteen (15) days before the available date therein specified.

"2. Within fourteen (14) days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates not theretofore assigned to another exhibitor or other exhibitors, within the period commencing upon the available date and ending thirty (30) days thereafter and give to the Distributor written notice of the date or dates so selected.

"3. Upon the failure of the Exhibitor to so select such date or dates the Distributor shall designate such date or dates by mailing written notice thereof to the Exhibitor."

APPENDIX C

Section 695, Title 28, U. S. C. A.

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."